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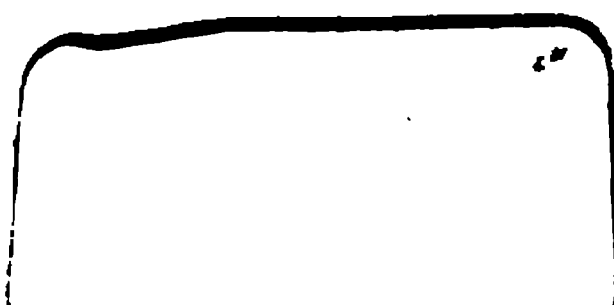
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REPORTS

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OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY JOHN W. KERN,
OFFICIAL REPORTER.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS

HON. BYRON K. ELLIOTT. * †

HON. ALLEN ZOLLARS. § ‡

HON. JOSEPH A. S. MITCHELL. ||

HON. WILLIAM E. NIBLACK. §

HON. GEORGE V. HOWK. §

• Chief Justice at the November Term, 1886.

† Term of office commenced January 3d, 1887.

‡ Chief Justice at the May Term, 1887.

§ Term of office commenced January 1st, 1883.

|| Term of office commenced January 6th, 1885.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
WILLIAM T. NOBLE.

SHERIFF,
MYRON NORTH.

LIBRARIAN,
CHARLES E. COX.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1886, IN THE SEVENTY-
FIRST YEAR OF THE STATE.

111 1
114 864
114 536

No. 12,888.

DONALD v. KELL.

JUDGMENT.—*Enforcement of.*—*Bankruptcy.*—*Character of Debt.*—Where the enforcement of a judgment is sought to be defeated by a discharge in bankruptcy, it is proper to look behind it to the character of the debt upon which it is founded; and if it is ascertained that the debt belongs to a class upon which the discharge does not operate, the judgment will be enforced.

SAME.—*Revival of Judgment.*—*Rights of Third Parties.*—*Record.*—*Administrator.*—*Wrongful Conversion.*—Where, in such case, a judgment is sought to be revived and enforced against real estate acquired by the debtor after his discharge in bankruptcy, and by him sold to a third party, and the record shows that the action in which the judgment was rendered was upon a promissory note, executed by the debtor in his individual capacity, the judgment will not be revived or enforced against such third party, although, in fact, the note on which the judgment was rendered had been given by the debtor to his successor, as administrator, for moneys belonging to the estate, which had been wrongfully converted by the former to his own use.

SAME.—*Pleading.*—*Answer.*—*Unnecessary Averments.*—Where an answer to a complaint to revive and enforce a judgment against one who has been discharged in bankruptcy shows that the judgment is founded on a

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promissory note, it is not necessary that there should be an additional averment that the debt was not incurred in a fiduciary capacity, as the note on its face implies a contract between the parties as individuals.

DECEDENTS' ESTATES.—Administrator.—Acceptance of Individual Note of Predecessor.—Judgment.—Where an administrator accepts from his predecessor (a former administrator) a promissory note, executed by the latter, payable to himself for money due from such predecessor to the estate of the decedent, and obtains judgment on such note in his own right, he can not, as against a third party, who purchases the real estate of the debtor, acquired by him after his discharge in bankruptcy, successfully assert that such cause of action was one not barred by the bankrupt's discharge.

From the Gibson Circuit Court.

W. M. Land and J. B. Gamble, for appellant.

J. E. McCullough and J. H. Miller, for appellee.

ELLIOTT, C. J.—The appellant seeks to revive a judgment and enforce it against real estate owned by the appellee. The judgment upon which the complaint is based was rendered against the grantor of the appellee, and was rendered prior to his acquisition of title. The answer of the appellee alleges that the judgment was rendered on a promissory note executed by his grantor, Robert Duncan, and one Andrew J. Lewis; that Duncan was adjudged a bankrupt, and a full discharge awarded him under the bankrupt act. The appellant replied that Duncan was the administrator of the estate of Alexander C. Donald, deceased, and, as such administrator, wrongfully converted to his own use one thousand dollars of the money of Donald's estate; that Duncan resigned his trust; that the appellant succeeded him, and that the promissory note on which the judgment was founded was executed to secure the payment of the money wrongfully converted by him.

The answer shows that the judgment is founded on a promissory note, and thus shows, *prima facie*, at least, that the debt was not created by the appellee's grantor while acting in a fiduciary capacity. *Hays v. Ford*, 55 Ind. 52. Where the pleading shows on its face that the foundation of the

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judgment is a promissory note, it is not necessary to aver that the debt was not incurred in a fiduciary capacity, for the note on its face implies a contract between the parties, and constitutes a debt not of a fiduciary character.

The doctrine of *Sorden v. Gatewood*, 1 Ind. 107, can not be extended to such a case as this, where the judgment is shown to have been founded on a contract. The answer need not go beyond the instrument on which the judgment is founded, for an answer which pleads a *prima facie* defence is good. Where, as here, the instrument which constitutes the foundation of the judgment is shown to be a promissory note, the presumption is that it evidenced a debt provable under the bankrupt law, and this presumption must prevail until overthrown.

Where the enforcement of a judgment is sought to be defeated by a discharge in bankruptcy, it is proper to look behind it to the character of the debt upon which it is founded, and if it is ascertained that it belongs to a class upon which the discharge does not operate, the judgment will be enforced. *In re Patterson*, 1 Nat'l Bk. Reg. 307; *In re Whitehouse*, 4 Nat'l Bk. Reg. 63; *Flanagan v. Pearson*, 14 Nat'l Bk. Reg. 37; *Howland v. Carson*, 28 Ohio St. 625; *In re Seymour*, 1 Ben. 348; *In re Robinson*, 6 Blatchf. 253; *Horner v. Spelman*, 78 Ill. 206; *Reid v. Martin*, 4 Hun, 590; *Simpson v. Simpson*, 80 N. C. 332; *Wade v. Clark*, 52 Iowa, 158 (35 Am. R. 262).

These cases do not create a new principle; they merely apply an old one, for it has long been the law that, wherever justice requires it, a judgment will be adjudged to be an old debt in a new form, and will not be regarded as creating a new debt. *Evans v. Sprigg*, 2 Md. 457; *Wyman v. Mitchell*, 1 Cowen, 316; *Clark v. Rowling*, 3 N. Y. 216. If, therefore, the judgment on which the appellant rests her action had been directly for the money wrongfully converted by Duncan, his discharge in bankruptcy could not prevail against it.

Donald v. Kell.

The search for the cause of action on which the judgment rests does not disclose a cause of action for the money converted by Duncan, but the cause of action revealed is upon a promissory note executed by him and another person. On the face of the record, the cause of action is upon the promissory note, and to ascertain the consideration for the note a second step back of the judgment must be taken.

Our opinion is, that where, as here, the rights of a purchaser are involved, the second step can not be taken. A purchaser is bound only by what the record discloses, and in this instance that disclosed a judgment on a debt which the discharge in bankruptcy extinguished. It would make titles insecure to permit a creditor in such a case to go back of the cause of action on which the judgment was founded, and defeat the purchaser by proof that it was not such a cause of action as it purported to be. But there is another consideration of great weight here, and that is this, the appellant accepted a promissory note, payable to herself, executed by Duncan and another person, for the money due from him to the estate of the decedent, and after having done this she obtained judgment in her own right, and, having elected to do this, she can not, at all events as against a purchaser, successfully assert that the cause of action was one not barred by the discharge in bankruptcy. In such a case as this, the creditor can not be permitted to travel back of the contract which appears on the face of the record as the foundation of the judgment, and prove another debt, for the purpose of defeating a purchaser who has purchased land to which the bankrupt acquired title after his discharge.

Judgment affirmed.

Filed May 10, 1887.

The Merchants Despatch and Transportation Company v. Merriam et al.

No. 12,668.

THE MERCHANTS DESPATCH AND TRANSPORTATION COMPANY v. MERRIAM ET AL.

COMMON CARRIER.—Contract.—Care Required Concerning Goods.—A stipulation in a bill of lading issued by a transportation company, that goods received for shipment at Boston are “to be forwarded to Louisville depot only,” does not relieve the carrier from its duty to properly care for them after their arrival at the latter place.

SAME.—Duty to Provide Place of Storage.—Although the bill of lading is silent on the subject, it is the duty of a common carrier, which becomes a part of its contract, to provide a place where goods may be safely kept after they have been unloaded from the cars in which shipment is made.

SAME.—Warehouseman.—Negligence.—Delivery to Wrong Person.—Conversion.—After goods are unloaded and stored, the liability of the carrier becomes that of a warehouseman, whether the depot or place of storage belongs to it or to another; and if, through its negligence, the goods are delivered to a wrong person, it is liable to the owner upon its contract for damages as for a conversion.

From the Marion Superior Court.

A. C. Harris and *W. H. Calkins*, for appellant.

R. Hill and *J. W. Nichol*, for appellees.

ZOLLARS, J.—On the 23d day of March, 1880, appellant received from G. & C. Merriam, a firm doing business in Massachusetts, a case of books to be carried from Boston to Louisville, Ky.

The case was safely transported, and arrived at Louisville on the 29th day of that month.

In the bill of lading, executed by appellant, are these provisions: “Received of * * * the following package, * * * to be forwarded * * * to Louisville depot only.” “All articles of freight on arrival at place of destination are at the risk and expense of the owner.” Also the following: “In no case will damages be allowed for wrong delivery or loss caused by defective marking with initials, or where the marks or directions are made on paper or cards.”

The consignees are given in the bill as G. & C. Merriam, Louisville, Ky.

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It is alleged in the complaint, that by the terms of the agreement, of which the bill of lading filed with and a part of the complaint is the written evidence, appellant undertook and agreed to carry the books from Boston to Louisville, and there deliver them to appellees or their duly authorized agent, upon a surrender of the bill of lading; that appellant did not so deliver the books, but, in violation of the contract and the bill of lading, wrongfully converted them to its own use.

Upon some points in the case, there is a conflict in the evidence, but there is evidence tending to establish the following as the facts in the case :

After the arrival of the books at Louisville, they were placed in the freight depot of the Louisville, Cincinnati and Lexington Railroad Company, and remained there until the 6th day of the following April.

The bill of lading, with a draft on one Judson W. Turner for the value of the books attached, was forwarded by appellees to a bank in Indianapolis, where Turner lived. By paying the draft, Turner would have been entitled to the bill of lading and the books. Without payment of the draft, he was not entitled to either the bill of lading or the books. He never paid the draft, nor did he in any other way pay to appellees the amount of the draft or the value of the books.

Subsequent to the arrival of the books at Louisville, he sent his brother to that city with a letter in the shape of an order for the books, signed by himself as "agent," on the Louisville, Cincinnati and Lexington Railroad Company. Upon that letter the railroad company delivered the books to the brother, and he disposed of them as directed by Turner.

Somewhat, perhaps, of the nature of an express company, appellant is clearly a common carrier, and, as such, subject to the rules of law applicable to such carriers.

Whether or not, in the absence of a stipulation in the bill

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of lading, such transportation companies are bound to deliver goods to the consignee in the manner express companies are, is a question we need not decide.

Whatever might otherwise be the rule, the stipulation in the bill of lading in this case, that the goods should be forwarded to the Louisville depot only, would be sufficient to relieve appellant from the duty of seeking, and making a personal delivery of the goods to the consignees at their residence or place of business, if they had any such at Louisville. In other words, under the stipulation of the bill, appellant was not bound to carry the goods beyond the Louisville depot.

Fairly interpreted, the bill of lading fixed no further limitation upon the duty and liability of appellant as a common carrier of the goods. It did not authorize it to unload the goods upon the platform at Louisville and pay no further attention to them.

It is the duty of such common carriers to provide a place where goods carried by them may be safely kept after they shall have been unloaded from the cars. This duty results from the nature and necessities of the business ; and, although the bill of lading may be silent upon the subject, there is an implied undertaking upon the part of the carrier, in a case like this, which becomes a part of the contract, that if the consignee shall not be present to receive the goods from the cars, or on the platform, it will store them in a safe place, and exercise at least reasonable care to preserve them from loss, and to deliver them to the proper consignee.

When the goods are thus unloaded and stored, the extraordinary liability of the common carrier, as an insurer, ceases, and it becomes responsible from that time forward as a warehouseman.

That liability, as we have in effect said, results from and rests upon the contract of carriage. There is but one contract, and when the contract is reduced to writing, it is evidenced by the bill of lading.

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If, therefore, after the goods are unloaded and stored, they are destroyed, or delivered to a wrong person, through the negligence of the carrier, it has violated its contract, and may be compelled to respond in damages in a suit upon that contract. In such a case, the action is based upon the contract. And if through the negligence of the carrier after the goods have been thus stored, they are delivered, not to the proper consignee, but to a wrong person, the carrier will be liable to the owner as for a conversion of the goods.

As fully supporting the foregoing propositions, we cite the following: *Bansemmer v. Toledo, etc., R. W. Co.*, 25 Ind. 434; *Pittsburgh, etc., R. W. Co. v. Nash*, 43 Ind. 423; *McEwen v. Jeffersonville, etc., R. R. Co.*, 33 Ind. 368 (5 Am. R. 268); *Jeffersonville, etc., R. R. Co. v. Irvin*, 46 Ind. 180; *American Express Co. v. Hockett*, 30 Ind. 250; *Adams Express Co. v. Darnell*, 31 Ind. 20; *American Express Co. v. Stack*, 29 Ind. 27; *Baltimore, etc., R. R. Co. v. McWhinney*, 36 Ind. 436; *Green and Barren River Navigation Co. v. Marshall*, 48 Ind. 596; *Cincinnati, etc., R. R. Co. v. McCool*, 26 Ind. 140; *American Express Co. v. Fletcher*, 25 Ind. 492; *McCulloch v. McDonald*, 91 Ind. 240; *Indianapolis, etc., R. R. Co. v. Remmy*, 13 Ind. 518; *Bartlett v. Pittsburgh, etc., R. W. Co.*, 94 Ind. 281; *Hall v. Pennsylvania Co.*, 90 Ind. 459; *Lake Shore, etc., R. W. Co. v. Bennett*, 89 Ind. 457; Hutchinson Carriers, sections 126, 351, 354, 388.

It is not shown by the evidence in the case before us, except inferentially, that the freight depot of the Louisville, Cincinnati and Lexington Railroad Company was also the freight depot of appellant. Nor is it shown very definitely that appellant placed the books in that depot. They were placed there by some one, and by the persons in charge delivered to Turner's brother. If, in fact, that depot was also the depot of appellant, and it placed the books therein, it was bound to exercise the care of a warehouseman in the delivery of them. If, in fact, appellant had no freight depot, but adopted that of the railroad company for the storage of

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the books, it was still bound to see to it that in the delivery of the books, such care was exercised as is required of a warehouseman.

Nor would it help appellant's case if it should be said that it neither had a freight depot nor stored the books, but left them on the platform at the depot. We are not enabled to say upon the evidence before us, that proper care was exercised in the delivery of the books.

Turner's brother was a stranger to those in charge of the depot where the books were stored. Judson W. Turner did not have the bill of lading, and there is evidence tending to show that neither he nor his brother had either a duplicate or a copy of it; nothing was presented to those in charge of the depot except an order or letter, signed by Judson W. Turner as "agent." It was not even stated therein that he was agent for appellees. In fact, he was not such agent, and had no authority, and could have no authority, to receive the books without having paid the draft attached to the bill in the possession of the bank.

The books were thus delivered to Turner's brother upon the letter alone, and without further inquiry as to his authority to receive them.

The evidence does not justify the delivery of the books to him, and hence that delivery did not relieve appellant from its obligations to deliver them to appellees. See again the cases above cited.

The judgment of the court below awarding damages to appellees is affirmed, with costs.

Filed May 10, 1887.

Kilander v. Hoover *et al.*

No. 12,613.

KILANDER v. HOOVER ET AL.

JUDGMENT.—*Estoppel.—Promissory Note.—Failure of Consideration.—Cancellation.*—Where, in a suit upon a part of a series of promissory notes given for the purchase-price of land, the others not being due, the answer sets up facts showing a failure of the consideration of the notes sued on only, but praying that the whole series be declared satisfied, and a judgment is rendered for the defendant, that judgment is not a bar to a proceeding upon the remaining notes, and a complaint in equity, based upon such judgment, to obtain the cancellation and surrender thereof, will not lie.

SAME.—*Action Upon Series of Notes.—When Judgment Bars Subsequent Action.*—It is only where the judgment involves the whole of a series of notes, and settles the entire defence thereto, that it operates as an estoppel as to the whole; otherwise the judgment is a finality only as to so much of the claims and defences as were actually litigated in the first suit.

From the Huntington Circuit Court.

J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellant.

B. M. Cobb, for appellees.

MITCHELL, J.—Kilander brought this suit to procure the cancellation of a certain promissory note executed by him to one Lucas. He alleged in his complaint, that on the 16th day of December, 1878, he purchased from Lucas a certain tract of land in Wells county, containing eighty acres, at the agreed price of one thousand dollars. The complaint averred that Lucas and wife conveyed the land so purchased to the plaintiff by warranty deed, and that the latter had executed three several promissory notes as security for the unpaid purchase-money. These notes were for the respective sums of three hundred and twenty dollars and eighty cents, three hundred and ten dollars and eighty-three cents, and three hundred dollars, due respectively in one, two and three years from the date of purchase. The complaint alleges further, that the plaintiff had been compelled to pay, in discharge of a vendor's lien previously existing against the land, over

111	10
113	91
115	300
121	489
111	10
125	608

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three hundred dollars, and fifty dollars for attorney's fees, and other sums, amounting in all to three hundred and seventy-two dollars and six cents, and that the west half of the eighty acres had been wholly lost to him by reason of a sheriff's sale to satisfy a judgment existing against his vendor, Lucas, at the time of the purchase. He also charged that he had been evicted from the west half so purchased, and that the amounts which he had been compelled to pay to discharge liens previously existing were more than equal to the value of the east half.

He further alleges that the purchase-money notes above described were assigned by Lucas to the defendant Hoover.

The assignee commenced suit on the first two notes in the Huntington Circuit Court in December, 1880. The plaintiff alleges that he filed his answer in that behalf, setting out, among other things, the facts above recited, concerning the failure of title, and the discharge of liens by him; and he avers that he set up in his answer that there was another note not yet due of three hundred dollars, given at the same time as those sued on, which remained outstanding, and that he prayed as relief in his answer so filed, that all the notes given for purchase-money be adjudged cancelled and satisfied.

The complaint charges further, that upon issues joined on the complaint and answer above mentioned, such proceedings were had in that behalf as that there was a finding for the defendant, and a judgment that the plaintiff take nothing, and that thereupon the plaintiff in that suit appealed to this court, where the judgment below was affirmed. *Hoover v. Kilander*, 83 Ind. 420.

The plaintiff herein further avers, that since the rendition and affirmance of the judgment above mentioned, the defendant Hoover has assigned the last mentioned note, as collateral security to the Lime City Building and Loan Association, and that his assignee, who is made a co-defendant herein, is threatening to bring suit, or cause suit to be brought on the note, claiming that it is a valid subsisting obligation against

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the plaintiff, which he alleges is a great annoyance, injury and damage to his credit.

Plaintiff avers that as to all of the notes so given, the rights, equities, interests, consideration and liabilities were fully determined and adjudged in his favor, in the former suit between Hoover and himself. Upon the foregoing facts, he prayed that the note so assigned be declared cancelled, and that the plaintiff have judgment for his costs.

The court below sustained a demurrer to the complaint, and the sole question presented is, whether or not, upon the facts stated, the judgment rendered in the action on the first two notes operates as an estoppel against proceeding upon the last note, which was not due, and not otherwise involved in the preceding litigation, than by the facts pleaded in the defendant's answer therein?

It is proper to say that the complaint before us presents a case somewhat anomalous in character. It is, in substance, a bill in equity to obtain the cancellation and surrender of a note, which the plaintiff alleges was, in effect, cancelled, as a result of a previous judgment rendered in his favor in a former suit.

The theory of the appellant's case is, that the former judgment is a complete estoppel against any further suit upon any of the notes mentioned, as well those sued upon as the one not due at the time the judgment was rendered. What he asks now is, that a court of equity shall aid him by its decree, so as to make the previous judgment, which he alleges was in his favor, and which he claims conclusively determined that he was not indebted on any of the notes, effectual to cancel the third note, which he says was in effect cancelled by that judgment.

Whether the aid of a chancellor may be invoked in any such case we do not now inquire, as the conclusion at which we have arrived renders the inquiry unnecessary. Do the facts put forward in the complaint show that the result of the former adjudication was such as to entitle the appellant to

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the surrender of the third note? A brief consideration of well settled principles will readily determine the inquiry.

The distinction between the estoppel which arises upon a judgment pronounced upon a claim or demand, when the same claim or demand is again brought in question, and when another distinct claim or demand, which constitutes an independent cause of action between the same parties, although connected with the same transaction, is the subject of a second action, must not be lost sight of. In the case first put, a judgment upon the merits operates as an absolute bar, and concludes the parties, and those in privity with them, as well in respect to every admissible matter of claim or defence which was actually presented and determined, as in respect to such indivisible claims or defences as might have been presented and determined. If either party fail to bring forward all matters connected with the claim or demand in suit, or the defence thereto, it is of no consequence that other matters than those presented existed. While the judgment stands, it is to be treated as a complete adjudication of all matters of claim or defence, either actually brought forward, or such as might have been brought forward and litigated. This was in effect determined in *Indiana, etc., R. W. Co. v. Koons*, 105 Ind. 507, and the cases therein cited.

In respect to such a case, it is strictly accurate to say that a judgment is equally effectual as an estoppel, as to all such grounds of recovery, or defence, as actually were, as well as to such as might have been, presented and determined. Where, however, an action is brought upon a claim or demand, or in reference to a particular subject-matter, and the defence to such action is that a judgment, rendered in a previous action between the same parties, upon a different claim or demand, or subject-matter, operates as an estoppel in a suit upon the second or subsequent claim or demand, different principles are to be applied.

In the last case, in order to make a previous judgment work an estoppel, it must be averred and proven in the

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second suit that the matters in issue, or points controverted and actually determined by the first judgment, were identical with those that are to be presented as a defence to the second suit. The judgment rendered in the first case is only conclusive as a plea, or as evidence, in a second or subsequent suit between the same parties, upon the same matter as was directly in question and determined in that case. *Cleveland v. Oreviston*, 93 Ind. 31 (47 Am. R. 367); *Felton v. Smith*, 88 Ind. 149 (45 Am. R. 454).

If it appears that the first judgment involved the whole claim or extended to the whole subject-matter, and settled the entire defence to the whole of a series of notes or claims, and adjudicated the whole subject-matter of a defence, equally relevant to and conclusive of the controversy between the parties, as well in respect to the claim or defence in judgment, as in respect to other claims and defences thereto, pertaining to the same transaction or subject-matter, then the first judgment operates as an estoppel as to the whole. *Cromwell v. County of Sac*, 94 U. S. 351; *Hazen v. Reed*, 30 Mich. 331; *Felton v. Smith*, *supra*; *Goble v. Dillon*, 86 Ind. 327 (44 Am. R. 308).

Unless, however, it is made to appear that the defences pleaded to the first claim, or demand, involved the whole title, or extended to the whole subject-matter, of the controversy between the parties, so as to litigate and determine the defendant's liability in respect to the whole transaction, then the judgment is a finality only as to so much of the claims and defences as was actually litigated in the first suit.

The facts stated in the complaint before us do not bring the case within the rule, which makes a judgment upon one of several claims operate as an estoppel in a suit upon another claim, arising out of the same transaction. The defence interposed to the notes first sued on was in effect, that the consideration of those notes failed, in that the title to one-half the land purchased was lost to the purchaser, by

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title paramount; and that certain incumbrances, amounting to three hundred and seventy-two dollars and six cents, existed on the other half, which the purchaser had been compelled to pay. It thus appears that the defence did not go to the whole transaction. It was not alleged that the whole title failed; nor did it appear what the relative value of the two parts of the entire tract was. The judgment did not, therefore, necessarily conclude the parties in respect to the whole transaction.

All that was conclusively determined by that litigation was, that the title to the west half of the land purchased had failed, and that the appellant had been compelled to pay three hundred and seventy-two dollars and six cents in order to remove incumbrances from the east half, and that as a result the consideration of the notes then in suit had failed. These subjects are not open for further litigation between the parties to the first suit, or those in privity with them. The first judgment did not, however, determine whether or not the value of the west half, and the amount of incumbrances paid by the appellant, were equal to the whole consideration, which he agreed to pay for the land. It may be, for all that appears, that the relative value of the east and west half was such that, notwithstanding the failure of the title to the west half, and the amount paid to remove incumbrances, the appellant should, nevertheless, pay the last note on account of the value of the east half, which he still retains.

It is true the appellant alleges, in his complaint, that the sums already paid by him exceed the value of the remaining forty acres. He may, however, have agreed to pay more than the value of the whole eighty. It can only be determined whether or not the consideration of the last note has failed, by ascertaining the relative value of each forty, as compared with the price which he agreed to pay for the whole.

If the two parcels were of equal value, the purchase-price

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of the whole being one thousand dollars, then the whole consideration for the third note has not failed. There are no facts stated in the pleading before us, which conclusively indicate that these subjects were determined in the first suit. Some general averments appear in the complaint, which state conclusions broad enough in their scope to embrace the idea, that everything pertaining to the whole subject-matter was determined. The pleader has, however, stated in his complaint the specific facts, which were set up in his answer to the first notes. These facts, and not the pleader's conclusions, must govern. If anything outside of the facts stated as having been set up in the answer to the complaint in the first suit, was determined in that suit, it was outside of the issue, and was, therefore, not binding. *McFadden v. Ross*, 108 Ind. 512.

The answer to the first complaint set up substantially nothing more than a failure of the consideration of the notes sued on. In the language of the court in *Clark v. Sammons*, 12 Iowa, 368, "The plea of failure of consideration in the first suit applied solely to the matters then in issue, to the claim of plaintiff, as then pleaded." If the consideration of the last note has also failed, that fact is open for future determination in another action, such as either party may hereafter see fit to bring.

Conceding everything that is claimed for the former judgment, it does not appear that it determined whether or not the consideration for the last note had failed.

Judgment affirmed, with costs.

Filed May 11, 1887.

The State, *ex rel.* Ruhlman, *v.* Ruhlman, Executrix, *et al.*

No. 11,914.

THE STATE, EX REL. RUHLMAN, *v.* RUHLMAN, EXECUTRIX, ET AL.

PLEADING.—Practice.—Answer in Abatement.—Demurrer.—Motion to Strike Out.—Where an answer in abatement is pleaded with an answer in bar, it should be struck out on motion; but neither the fact that it does not precede the answer in bar, nor that it is not verified, renders it bad on a demurrer for want of facts.

SAME.—Answer in Bar.—Abatement.—Party in Interest.—An answer which states facts showing that the plaintiff had no interest in the subject-matter of the action at the time of its commencement, and that some other person named was at the time the real party in interest in such suit, is an answer not in abatement, but in absolute bar, of the pending action.

WILL.—Bequest to Wife.—Action.—Party in Interest.—Conversion.—Executor.—Where, by the express terms of a will, the testator gave and bequeathed all his personal property, absolutely and without limitation or restriction, to his wife, an action can not be maintained by an heir, during the lifetime of the wife, upon the bond of the executor, for the unlawful conversion by such executor of any part of the personal estate, the wife being the only party interested, and she alone having a right to complain of such conversion.

From the Shelby Circuit Court.

E. P. Ferris, J. S. Ferris and W. W. Spencer, for appellant.
N. B. Berryman, for appellees.

HOWK, J.—This was a suit by appellant's relator, as plaintiff, upon the bond of one John B. Ruhlman, as executor of the last will of Bernhard Henry Ruhlman, deceased, against appellee Dores Ruhlman, as executrix of such executor, since deceased, and Henry Rahe, the surety in such executor's bond, as defendants.

The breach of the condition of the executor's bond, assigned by the relator in his complaint herein, was, that said John B. Ruhlman, as such executor, had failed and neglected to inventory, or to charge himself with, in any manner, three promissory notes due and payable to his testator, at the time of his death, and described in a bill of particulars filed with

111	17
112	487
113	460
115	14
122	258
111	17
127	565
111	17
128	292
111	17
131	41
111	17
134	600
111	17
137	654
111	17
142	557
143	334
111	17
160	406

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such complaint, all of which notes the relator averred that such executor had collected, and, without accounting for the proceeds thereof either to the proper court or to any person interested therein, had unlawfully converted the same to his own use, to the relator's damage, etc.

The cause was put at issue and tried by a jury, and a verdict was returned for appellees, the defendants below, and over the relator's motion for a new trial, the court adjudged that he take nothing by his suit, and that appellees recover of him their costs.

Errors are assigned here by appellant's relator, which call in question the overruling (1) of his demurrer to the fourth paragraph of appellees' answer, and (2) of his motion for a new trial.

The relator sued herein as an heir at law and legatee under the last will of Bernhard Henry Ruhlman, deceased. To the relator's complaint, the appellees jointly answered in four paragraphs, of which the first was a general denial of the complaint, and each of the other paragraphs stated a special defence. The relator's demurrers were sustained as to the second and third paragraphs, and overruled as to the fourth paragraph of appellees' answer. In this fourth paragraph of answer, appellees admitted that Bernhard Henry Ruhlman died testate, and that John B. Ruhlman was duly appointed executor of his last will, and, as such, executed the bond, as set forth in the relator's complaint; but they averred that, by the will of such testator, which was duly probated in Shelby county, Bernhard H. Ruhlman bequeathed to his widow, Susannah Ruhlman, all his personal property, money and notes; and that said Susannah Ruhlman was still living. Wherefore the relator had no interest in the matters in suit herein, and should not maintain this action, and appellees demanded judgment.

It is claimed by relator's counsel, as we understand their argument, that this fourth paragraph of appellees' answer is a plea in abatement, and that it was error to overrule the

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demurrer to such paragraph, because it did not precede, but was pleaded with, other paragraphs of answer in bar of the action. Our code provides, it is true, that "An answer in abatement must precede, and can not be pleaded with an answer in bar, and the issue thereon must be tried first and separately." Section 365, R. S. 1881.

It does not follow, however, by any means, that, if an answer in abatement be pleaded with an answer in bar, it will be error to overrule a demurrer, for the want of sufficient facts, to such answer in abatement. Where an answer in abatement does not precede, but is pleaded with an answer in bar, the plaintiff should move the court to strike out or reject the answer in abatement, and it would be error, we think, to overrule such motion.

In the case in hand, if the fourth paragraph of answer had been an answer in abatement, the court would have sustained the relator's motion, we may well suppose, to strike out or reject such paragraph upon one or both of two grounds, namely: 1. Because the paragraph was not "supported by affidavit;" and, 2. Because it did not precede, but was pleaded with, an answer in bar of the action. Neither of these grounds, however, would have authorized the court to sustain the relator's demurrer, for the want of sufficient facts, to the fourth paragraph of appellees' answer, even if such paragraph were, in fact, an answer in abatement. *Toledo Agricultural Works v. Work*, 70 Ind. 253; *Vail v. Rinehart*, 105 Ind. 6.

But the fourth paragraph of answer was not a plea in abatement, but was, on the contrary, an answer in absolute bar of the relator's action. Without controverting any of the allegations of the relator's complaint, the appellees simply said in the fourth paragraph of their answer, the substance of which we have heretofore given, that the relator had no interest whatever, as heir at law or legatee of Bernhard Henry Ruhlman, deceased, in the three promissory notes which were the subject-matter of this suit; but that,

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by reason of such decedent's bequest of all his personal property, money and notes to his widow, Susannah Ruhlman, who was still living, she became and was the only real party in interest in the subject-matter of this action. Our code provides that "Every action must be prosecuted in the name of the real party in interest." Section 251, R. S. 1881. It is settled by our decisions, that an answer, which states facts showing, if true, that the plaintiff had no interest in the subject of the action, at the time of its commencement, and that some person, naming him, other than such plaintiff, was at the time the real party in interest in such suit, is an answer not in abatement, but in absolute bar, of the pending action. *Wilson v. Clark*, 11 Ind. 385; *Lewis v. Sheaman*, 28 Ind. 427; *Hereth v. Smith*, 33 Ind. 514; *Curtis v. Gooding*, 99 Ind. 45; *Pixley v. VanNostern*, 100 Ind. 34. "It has long been the rule in this State, that the defence that the plaintiff is not the real party in interest must be specially pleaded." *Felton v. Smith*, 84 Ind. 485, and cases cited.

It must be held, therefore, we think, that the fourth paragraph of appellees' answer herein stated a good defence in bar of this action, and that the relator's demurrer to such paragraph was correctly overruled.

2. Under the alleged error of the court, in overruling the relator's motion for a new trial herein, his counsel claim that the verdict of the jury, in appellees' favor, was not sustained by sufficient evidence. This claim of counsel can not be maintained. Certainly, there is evidence in the record of this cause, which not only tends to sustain, but, as we think, very fully sustains, the verdict of the jury on every material point. It is not our province, as an appellate court, to weigh the evidence adduced by the parties respectively before the trial court and jury; but if it were, it would seem to us that the evidence appearing in the record fairly preponderates in favor of the appellees, and fairly sustains the verdict in their favor. Without conflict therein, the

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evidence fully sustains the fourth paragraph of appellees' answer, which, as we have seen, is an absolute bar of the relator's pending action. The will of Bernhard Henry Ruhlman, deceased, was put in evidence by the relator herein. By the *fourth* item of his will, the testator gave and bequeathed all his personal property, "such as money and notes, etc.," absolutely and without any limitation or restriction thereon, to his "beloved wife, Susannah Adele Ruhlman." It was shown that Mrs. Ruhlman was still living, as she testified on the trial of this cause as a witness for appellees.

If it were conceded, therefore, that the other evidence appearing in the record, without any conflict therein, showed conclusively that John B. Ruhlman, as executor of the last will of Bernhard Henry Ruhlman, deceased, had not only collected all the money due on the three promissory notes, which were the subject of the relator's action, but had also, as charged, unlawfully converted such money to his own private use, still, we could not disturb the verdict of the jury, nor reverse the judgment below, in favor of the appellees, upon the entire evidence given in the cause. Because, the facts stated in the fourth paragraph of answer having been shown to be true by uncontradicted evidence, it is very clear, we think, that the unlawful conversion of the moneys, so collected by such executor, did not affect the relator in any manner, or to any extent, nor give him any right of action upon the executor's bond against the appellees herein. For, in such case, the testator's widow, Susannah A. Ruhlman, was the real party in interest, and she alone had the right to complain of the unlawful conversion of the moneys so collected, or to maintain any action therefor or on account thereof.

But the evidence wholly fails to show, as it seems to us, that the executor, John B. Ruhlman, had converted to his own use any of the moneys so collected by him on such three promissory notes. It is negatively shown that the

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executor did not include such three notes in his inventory of the estate of his testator, because such notes do not appear in the inventory which was put in evidence. But it was fairly shown by the evidence in the record, that the money due on such notes was paid to the executor, after his appointment as such and before he filed his inventory of the testator's estate; and that he had included the money so collected in such inventory afterwards filed, and therein had charged himself, as such executor, with the amount of such money as so much money on hand, belonging to the estate of his testator. Our consideration of the entire evidence, as it appears in the record, has strongly impressed our minds with the opinion that this cause was fairly tried below upon the merits, and that a right conclusion was arrived at by the jury, in their verdict herein, which was approved by the court below. In such a case, as we have often decided, the verdict will not be disturbed here, for or on account of error in any of the instructions given by the court. *Cassady v. Magher*, 85 Ind. 228; *Norris v. Casel*, 90 Ind. 143; *Ledford v. Ledford*, 95 Ind. 283; *Sanders v. Weelburg*, 107 Ind. 266. So, also, our code provides that "where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below," as it appears to us in this case, the judgment shall not "be stayed or reversed, in whole or in part." Section 658, R. S. 1881.

We pass by the rulings complained of, in relation to the competency of witnesses and evidence, because, in the view we have taken of this case, these rulings, even if erroneous (and they were not in our opinion), would not and could not authorize the reversal of the judgment.

The court did not err, we think, in overruling the relator's motion for a new trial.

The judgment is affirmed, with costs.

Filed May 11, 1887.

Cincinnati, Indianapolis, St. Louis and Chicago Railway Co. v. McDade.

No. 12,882.

CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO
RAILWAY COMPANY v. MCDADE.

111	23
196	588
111	23
157	112
111	23
163	298

APPEAL.—*Action Begun Before Justice of Peace.*—*Amount of Recovery.*—*Complaint.*—Where, in an action instituted before a justice of the peace, the amount of the recovery both there and in the circuit court is fifty dollars, and there is no question of counter-claim or set-off, an appeal by the defendant to the Supreme Court will not lie, although the complaint demands judgment for more.

From the Newton Circuit Court.

D. E. Straight, U. Z. Wiley and S. F. Carter, for appellant.

M. H. Walker, I. H. Phares and E. P. Hammond, for appellee.

ELLIOTT, C. J.—The appellee instituted this action before a justice of the peace and obtained judgment for fifty dollars. The appellant appealed from that judgment to the circuit court, and in that court the appellee recovered judgment for the same amount as that awarded by the justice of the peace. While the case was pending in the circuit court the appellee amended his complaint so as to claim judgment for sixty dollars. In this court a motion to dismiss the appeal is vigorously pressed.

This motion must prevail. It is not the amount demanded in the complaint which governs, but the amount of recovery, for where there is no counter-claim or set-off, and the plaintiff is satisfied with the amount awarded, that is all that is in controversy. This has been held in many cases. *Painter v. Guirl*, 71 Ind. 240; *Sprinkle v. Toney*, 73 Ind. 592; *Parsley v. Eskew*, 73 Ind. 558; *Pennsylvania Co. v. Trimble*, 75 Ind. 378; *Louisville, etc., R. W. Co. v. Coyle*, 85 Ind. 516; *Winship v. Block*, 96 Ind. 446.

Appeal dismissed.

Filed May 11, 1887.

No. 12,850.

111 24
116 373
123 212
123 146

THE UNITED STATES MORTGAGE COMPANY v. HENDERSON ET AL.

ATTACHMENT.—*Abandonment of Proceeding.*—*Dismissal.*—*Judgment.*—*Supreme Court.*—*Practice.*—Where an attachment proceeding is instituted, as auxiliary to an action for the recovery of a debt, and a personal judgment is taken, without an adjudication of the proceeding in attachment, the latter will be deemed abandoned. The taking of the judgment is equivalent to a dismissal of the attachment proceeding, and there being a full appearance to the main action by the defendant, no available error can be predicated upon a ruling relative to the auxiliary proceeding.

PLEADING.—*Complaint.*—*Defect in Form.*—If a complaint state a cause of action, reciting the facts so as to enable a person of common understanding to know what was intended, the judgment will not be reversed on account of defects in the form of pleading.

PRINCIPAL AND AGENT.—*Mortgage.*—*Contract.*—*Subrogation.*—Where a contract of agency provided that the agent was to loan money for the principal upon mortgage security, and that the former should become personally liable to the latter for all instalments of interest on such money loaned, which were not paid within ten days after they became due, such agent, upon the payment of any such instalment of interest under the contract, would be entitled to a remedy against the borrower for the amount so paid, and to participate in the mortgage security to the extent of such payment.

SAME.—*Foreclosure.*—*Instalments of Interest.*—Where a loan company, mortgagee, avails itself of a provision in the mortgage that upon a default in the payment of an instalment of interest, the entire debt should become due, and forecloses the mortgage, taking judgment for the whole amount, principal and interest, it can not afterwards enforce a contract with its agent who made the loan, which provided that the latter should be liable to the principal for all instalments of interest on moneys loaned by him as such agent, which were unpaid ten days after they became due.

SAME.—In such case the decree of foreclosure merged the entire contract with the mortgagor, as well in respect to instalments of interest matured as in respect to those not matured, in the judgment and decree, and the agent would not, after such foreclosure, be liable under his contract for any of such instalments.

SAME.—*Loan Agent.*—*Attorney.*—*Liability of Principal for Additional Services Rendered by Agent.*—In a contract between principal and agent, that the latter should make loans of money on bonds and mortgages and collect money to become payable on such loans, a provision that the former should not be liable for any charges, disbursements or commis-

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sions to the agent for his services in such agency, does not relieve the principal from liability to the agent for services rendered by him at the former's request, in foreclosing mortgages and collecting moneys by legal proceedings, looking after repairs to and caring for property bought in by the principal upon foreclosure of its mortgages, for renting and collecting rents of such property, and looking after the payment of taxes, and keeping up insurance thereon, and other like services.

ATTORNEY AND CLIENT.—*Good Faith.*—*Diligence.*—*Violation of Instructions.*—*Ratification.*—*Compensation of Attorney.*—Where an attorney, in good faith, and acting as he believes for the best interests of his client, exercising reasonable skill and diligence, takes steps in the foreclosure of a mortgage, and the appointment of a receiver for mortgaged property, in violation of instructions of his client, and the latter afterwards ratifies and accepts the benefits of such action, and adopts the receivership established, such attorney is entitled to a reasonable compensation for his services.

SAME.—In such case, if the attorney acted in bad faith, or if he had violated the instructions of his client, and the proceedings taken by him had not been ratified, he would be entitled to no compensation for the services so rendered.

COMPROMISE.—*Contract.*—*Consideration.*—In order that a compromise may constitute a sufficient consideration for the enforcement of an executory contract, there must have been an actual *bona fide* claim, founded upon a colorable right, about which there was room for honest doubt and actual dispute.

From the Marion Superior Court.

T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker and E. Daniels, for appellant.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellees.

MITCHELL, J.—This suit involved the settlement of accounts between the United States Mortgage Company and William Henderson. It appears from the record that the United States Mortgage Company is a corporation organized under the laws of the State of New York, for the purpose of loaning money on bonds and mortgages. In October, 1874, this corporation entered into a written contract with William Henderson and Alexander C. Jameson, whereby the latter were appointed its agents, for the purpose of making loans of money in the State of Indiana, and collecting

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moneys to become payable upon the loans thus made. Among other stipulations, the contract of agency provided that if the interest upon any loan, made by the agents therein appointed, should be unpaid, and in arrears for the period of ten days after the same should fall due and become payable, then, in every such case, the agents themselves should immediately pay the amount so in arrears to the company. The contract provided further, that the mortgage company should not be liable to the agents for any charges, disbursements or commissions for their services in connection with the agency, and that the agency might be terminated by the company at any time.

Sums aggregating about \$450,000, in amount, were loaned by Messrs. Henderson & Jameson, during the years 1874, 1875 and 1876, under this contract. In 1878, the mortgage company, having some time before refused to furnish any more money to loan, Jameson withdrew from the business, and turned over and assigned his interest in the accounts to Henderson. After the termination of the relation of principal and agent, a disagreement arose as to the state of the accounts between the mortgage company and Henderson. The result was the institution of this suit by Mr. Henderson, on the 8th day of October, 1881, in the superior court of Marion county. He alleged in his complaint that the company was indebted to him in the sum of \$14,424.68, with interest from the dates of the several amounts charged, as shown in the bill of particulars filed with his complaint. The bill of particulars exhibited with the complaint stated an itemized account against the "United States Mortgage Company to Wm. Henderson, debtor." The bill stated thirteen separate items, in different amounts, of which the following is an example:

"1878. To foreclosing mortgage v. J. M. Hume, \$600."

It also stated two items in different amounts, one of which is as follows:

"1881. To general attention to your business from March

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8th, 1878, to September 8th, 1881, at rate of \$1,800 per annum, \$6,300."

There were four items, of which the following is an example:

"To cash paid by Alexander C. Jameson and William Henderson, on the loan of Joseph K. English, May, 1876, \$200, November, 1876, \$200, and May, 1877, \$200, which sums were embraced in the decree of foreclosure of said mortgage, and bid in for the full amount by said United States Mortgage Company, and the interest of said A. C. Jameson, assigned to me, \$600."

Concurrently, with the filing of the complaint, a writ of attachment was sued out. It is claimed that the attachment was improvidently issued, and that the court erred in overruling a motion to quash the writ. The event of the suit was such that it is now of no consequence whether this ruling was correct or otherwise. The attachment was abandoned. This follows from the fact that a personal judgment was taken against the defendant without an adjudication of the proceedings in attachment. Taking a personal judgment without more was equivalent to a dismissal of the attachment. The judgment stands as though no auxiliary proceedings had ever been commenced. *Sannes v. Ross*, 105 Ind. 558; *Smith v. Scott*, 86 Ind. 346; *Lowry v. McGee*, 75 Ind. 508.

The litigation having progressed to final judgment, after a full appearance to the action by the mortgage company, no available error can now be predicated upon a ruling in respect to the attachment proceeding, which was in effect dismissed.

The court overruled a demurrer to the complaint, and this ruling is the subject of the second assignment of error.

We make the following extract from the complaint, which is all that bears upon the subject presented: "The said defendant, the United States Mortgage Company, is indebted to plaintiff in the sum of \$14,424.68, with interest thereon from the dates of the several items of account, the bill of particulars of which is filed herewith and hereby made a part of the complaint, marked 'Exhibit A.'"

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The complaint, as has already been seen, is upon an account stated against the United States Mortgage Company, to William Henderson, Dr. The objection made to the complaint is, that it fails to show that any service had been rendered by the plaintiff for the defendant at its request, or with its knowledge or approval, or that any money had been expended for it, on its account, or that it ever promised to pay, etc. The complaint does not furnish a model of good pleading, but applying to it the liberal rule of the code, which only requires that the facts be stated, so as to enable a person of common understanding to know what was intended, we should not feel justified in reversing the judgment for what seems at most a defect in the form of pleading. Sections 338, 376, 658, R. S. 1881.

Considering the complaint and the bill of particulars together, the inference fairly arises that the indebtedness charged in the complaint was for services rendered the mortgage company, in foreclosing certain mortgages therein specified, and for general attention to its business, etc. Applying the liberal rule of construction of pleadings, which the code enjoins, we are constrained to hold that there was no error in overruling the demurrer to the complaint.

Besides denying generally any indebtedness to the plaintiff, the mortgage company presented special matters of set-off and counter-claim. It appeared that a loan of \$60,000 had been made by the agents to the Indianapolis Journal Company. This loan was to run ten years, and was secured by a real estate mortgage. The interest was to be paid semi-annually at the rate of 9 per cent., this agreement being evidenced by twenty separate interest coupons for twenty-seven hundred dollars each.

The mortgagors made default in the payment of some of these coupons. The mortgage company, predicated its claim on that provision in the contract of agency, which required the agents themselves to pay all interest on loans made by them, and which remained in arrears ten days after it became

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due, asserted that the agents were indebted to it under the contract for the unpaid interest coupons on the loan to the Journal Company.

To this claim it was replied that some of the coupons fell due before, and some after, the month of October, 1879, and that the mortgage contained a provision therein written, to the effect that a failure by the mortgagor to pay any of the interest coupons within a month of maturity gave the mortgagee the privilege, at his election at any time thereafter, of treating the principal debt, as well as the arrearages of interest, as due. In pursuance of this provision, the mortgagor having made default in paying the coupons which fell due respectively in February and August, 1879, the mortgage company exercised its option, and elected that the principal and arrearages of interest should be due, and foreclosed the mortgage for the whole in October, 1879.

Without further detailing the facts put forward in the various paragraphs of the pleadings, it is enough to say they present the following questions: Two instalments of interest having become due on the loan to the Journal Company, for the payment of which Henderson and Jameson had become liable under their contract with the mortgage company, can they be held for the payment of these instalments after the mortgage company elected to treat the whole debt as due, and after it has foreclosed the mortgage and included both principal and interest in its judgment and decree against the Journal Company? After the mortgage company elected to treat the principal sum as due, and proceeded to foreclose its mortgage, can it now look to Henderson and Jameson for payment of the interest subsequently accruing on the decree?

In respect to the first proposition: Assuming that the matter was a proper subject of counter-claim—which is fairly open to doubt—since the mortgage company availed itself of the option to treat the principal debt as due, because of the default of the mortgagor in failing to pay interest, and proceeded to merge both the principal and unpaid interest

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into a judgment and decree in its favor, we can discover no principle which would justify it now, while holding a decree and judgment against the mortgagor for the whole, in pursuing a remedy against Henderson and Jameson, upon their personal contract. The stipulation in the contract, by which Henderson and Jameson agreed, in case any interest on loans negotiated by them should remain in arrears for a period of ten days, that they would immediately pay such interest themselves, put them in such relation to the loan as entitled them to a remedy against the borrower, and to participate in the security, in the event they were called upon to pay the interest coupons. Instead of electing to require its agents to pay the arrearages of interest, and to continue the loan, the mortgage company exercised its option and appropriated the coupons, and declared a forfeiture of the credit to the borrower. The coupons, which drew ten per cent. interest as soon as they matured, would have become the property of Henderson and Jameson upon payment by them. They were secured by the same mortgage that secured the principal. The mortgage company took a decree and judgment for the whole, thus depriving its agents of their security, and of their right to proceed against the borrower. It may not now, while prosecuting its remedy upon the mortgage, which presumably covers property of sufficient value to satisfy the whole debt, pursue a personal remedy against its agents. To permit this would enable the mortgage company to use the interest coupons to accomplish its own ends, so far as forfeiting the borrower's credit and obtaining a decree of foreclosure for the whole debt, and then, after having complicated and embarrassed Henderson and Jameson in their remedy, to proceed against them personally. Henderson and Jameson can have no remedy against the mortgagor, except as they are subrogated to the securities of the mortgage company. The company having appropriated the coupons, and merged them in a decree in its own name, it is difficult to perceive how the agents could

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now proceed against the Journal Company, if they are compelled to pay the interest coupons.

Our conclusion is, that the effect of the agreement between the mortgage company and its agents was such as to authorize it to require them to take up the interest coupons, upon which default had been made, or, at its option, to retain them and declare the debt due, and proceed to foreclose its mortgage for both principal and interest. It elected to pursue the latter course, and it must now abide its election.

Concerning the interest which has accrued since the decree of foreclosure, it is clear that resort can not be had to the contract in question for its recovery. By the option which the mortgage company was authorized to exercise, according to the terms of the mortgage, the whole debt became due. The decree of foreclosure merged the entire contract with the Journal Company, as well in respect to interest coupons matured, as in respect to those not matured, into the judgment and decree. The contract of loan was then terminated, and the liability of the borrower fixed. Thenceforth the mortgagor's liability was measured by the decree, and the interest coupons as well as the entire contract were *functus officio*. The liability of the Journal Company, as also that of the agents, was then at an end, so far as subsequently maturing interest coupons were concerned. The case is not distinguishable in principle from *Hamilton v. Van Rensselaer*, 43 N. Y. 244. See, also, *Melick v. Knox*, 44 N. Y. 676; *Hunt v. Roberts*, 45 N. Y. 691.

The fourteenth instruction given by the court is the subject of argument. In this instruction the court stated the issues relating to the subject of the interest coupons above referred to, and also gave the law in charge to the jury in respect to the interest and the respective rights of the parties upon that subject, in consonance with what has already preceded. In so far as the issues were—evidently by inadvertence—inaccurately stated by the court in this instruction, the inaccuracy was immaterial, and could have in no wise affected

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the principles laid down. The instruction, however, embraced another subject of which it is proper that something should be said in this connection. The claim was made both in the pleading and in the evidence, that Mr. Henderson, acting as the attorney of the mortgage company in foreclosing the mortgage against the Journal Company, foreclosed for the principal and interest in violation of instructions, and without the knowledge of his client and principal, when he was instructed to foreclose only for the matured interest, and that he had thereby made himself liable for the interest.

Pertinent to this feature of the case, the court instructed the jury, in substance, that however that might be, since the decree of foreclosure had been given, and the bond, mortgage and coupons had all been merged in the decree, even if Henderson had acted in bad faith, and thereby made himself liable to his client for any damage which may have accrued to it, the issues were not so formed in this case as to authorize an assessment of damages on that account. The court told the jury, moreover, that if Mr. Henderson acted in good faith, and with an honest purpose to protect the interests of his client, and the mortgage company, with full knowledge of what had been done, ratified the decree and the receivership established thereunder, and accepted and enjoyed the benefits procured under the decree, it could not then assert that the acts of Henderson in procuring the decree were unauthorized, so as to hold him liable on his contract for the payment of interest in this action. Without enlarging, it is sufficient to say, we approve the instruction as a correct statement of the law applicable to the subject-matter under consideration. If we should adopt the appellant's view, and assume that Mr. Henderson had not acted in good faith, it would by no means follow that it could treat the decree into which the securities have all been merged as subsisting for its benefit, and at the same time proceed against him under the contract for the interest which is merged in the decree. If the appellee is liable for misconduct as the appellant's attorney, that liability

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is altogether independent of, and without any relation to, the written contract of agency. The question at this point, is not as to the effect of negligence or misconduct in attending to his client's business, upon the right of the attorney to recover for services, nor as to his liability to the client for any resulting injury, but whether or not his alleged bad faith continued his liability under the contract for the interest coupons, after they were merged in a decree, the benefits of which his clients adopted. This is all that need be said in respect to the claim of the appellant that its agent remains liable on his contract for interest.

One of the items included in the plaintiff's bill of particulars, upon which his complaint was founded, was a charge for services in foreclosing the mortgage against the Journal Company. It is strenuously urged that the evidence shows that Mr. Henderson declared a forfeiture of the credit to the Journal Company, and foreclosed the mortgage for the whole amount, in violation of the instructions of the mortgage company, and that his conduct in relation to the whole matter was such that he was not entitled to compensation for his services in the foreclosure proceeding. In respect to this subject there was a mass of evidence given to sustain the positions assumed by the litigants respectively. Relevant to that subject, the court instructed the jury, in substance, that, notwithstanding the foreclosure suit in question may have been originally commenced under instructions from the mortgage company to proceed only for the matured interest coupons, yet if, after the proceeding was so commenced, such a condition of affairs ensued as that during the litigation that followed Mr. Henderson, in good faith, believed it to be for the protection and advancement of the interests of the mortgage company, that he should give notice of a forfeiture, and foreclose the mortgage for both principal and interest, and that he did so foreclose it, and within a reasonable time thereafter notified his client of what

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had been done, explaining to them the reasons and apparent necessity for so doing, and the company did not repudiate, or make any attempt to set aside the decree, but accepted the benefits thereof, and adopted the receivership established thereunder, then such acceptance was a ratification of what had been done ; and that under such circumstances Mr. Henderson was entitled to reasonable compensation for his services.

The jury were further instructed that if the appellee had violated his instructions in making an election for the company, and failed to give the company notice of the course pursued, and if the election made and the proceedings taken had not been ratified by the company, then nothing should be allowed for his services in the foreclosure proceeding. These instructions put the question in issue between the parties fairly to the jury.

It is impossible that parties or attorneys should foresee in advance every emergency which may arise during the progress of a litigation, and it is not every mistake or misapprehension that will render an attorney liable, or forfeit his right to compensation. If the attorney exercises reasonable and ordinary skill and diligence, and proceeds in good faith with an honest purpose to subserve the best interest of his client, the latter may not accept the fruits of his labor without objection, and then deny and refuse to make compensation.

We are unable to ascertain from the record whether or not the jury allowed anything in their verdict, which was for a gross sum, for foreclosing the Journal Company mortgage. As we discover no error of law relating to that subject, and as it is impossible to tell which way the jury found the facts on that issue, we do not examine the evidence or consider the point further.

The mortgage company claimed that there had been a settlement and accounting between it and Mr. Henderson, prior to the commencement of this suit, and that it was

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ascertained at that settlement that Henderson and Jameson were indebted, on account of interest guarantees on loans made for the company, under the contract of agency, to the amount of \$11,650.66. Henderson executed six notes covering this amount, payable to the company. The plaintiff alleged that these notes, which were pleaded as a set-off to his claim, had each and all been executed without consideration.

The evidence tended to show that the various sums which entered into the settlement and made up the amount for which the notes were executed, were, with but one exception, for interest claimed to be due from the agents of the mortgage company, under their agency contract.

There was also evidence tending to prove that the interest thus claimed had all been realized by the mortgage company, by being embraced in various decrees of foreclosure, upon which the company had in each instance bid in the mortgaged property for the full amount of the decree. The claim of the company seemed to be, that notwithstanding the interest had been so included in the several decrees, which had been fully satisfied by sales of property, yet the circumstances were such that the agents remained liable, under their contract, for the interest so included, nevertheless. After being appropriately instructed by the court in reference to this feature of the case, the jury, by their verdict, affirmed the position of the plaintiff below, viz., that the notes had been executed without consideration.

The appellant, however, assumed the law to be, and so asked the court to give it in charge to the jury, that if there was a controversy between the parties respecting the liability of the plaintiff to pay the claims for interest, and the company, in good faith, believed that its agents were indebted to it upon the claim preferred, and the plaintiff, in order to settle the dispute and avoid litigation, executed the notes in question, then, whether the company had an actual claim or real right was immaterial, since, in that event,

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the compromise of the controversy was a sufficient consideration for the notes.

The charges requested proceed upon the idea that no matter how groundless the claim of the mortgage company may have been, so that it was made in good faith, under the belief that the plaintiff was liable, if as a result of making the claim the notes were executed in order to avoid litigation, they were upon a sufficient consideration. It must be conceded that decisions from courts of great respectability and authority are cited, which seem to sustain the theory of appellant in all its breadth.

The rulings of this and other courts do not, however, sustain the view urged on appellant's behalf. In the first place, in order that a compromise may constitute a sufficient consideration to support an executory contract, the claim compromised must have been at least "doubtful," and there must have been some colorable ground of dispute, and some legal or equitable foundation for the claim. *Harris v. Cassidy*, 107 Ind. 158.

If, for instance, a question is made concerning the liability of a party under a written contract, upon the face of which the rights of the parties are perfectly plain, it has been held that a compromise of such a dispute is without consideration. *Coy v. Stucker*, 31 Ind. 161. So, where the maker of a note secured by mortgage, had paid the note in full, but the holder, claiming that it had not all been paid, refused to surrender the note and release the mortgage, until another note was executed for the amount claimed to be due, it was said "that there must be at least a colorable ground of a claim, in law or in fact, to sustain an executory contract, given as a compromise." *Smith v. Boruff*, 75 Ind. 412.

In the recent case of *Warey v. Forst*, 102 Ind. 205, the facts were that a claim was made, that a husband had fraudulently conveyed his real estate to his wife. A creditor of the husband believed that he had a right to set the conveyance aside, and subject the land to the payment of his

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debt. The wife, for the purpose of avoiding threatened litigation, executed a note and mortgage upon the land. Commenting upon the facts, the court said: "The finding does not show the compromise of any actually existing liability; it states only the belief of the defendant that he had a claim, without any fact upon which such belief is founded; it is not found that there was any valid claim against the plaintiff. * * * There is no fact found upon which even a doubtful claim could arise in favor of the defendant against the plaintiff. A threatened litigation, founded merely on the defendant's belief, without any fact to support the belief, amounts to nothing, and the purpose to avoid such a litigation was no consideration for the plaintiff's promises." *Wade v. Simeon*, 2 C. B. 548; *Edwards v. Baugh*, 11 Mees. & W. 641; *Spahr v. Hollingshead*, 8 Blackf. 415.

In the language of the court in *Jarvis v. Sutton*, 3 Ind. 289, "It is true a compromise of doubtful claims may be sufficient to found a consideration upon, but in such cases there must be a surrender of some legal benefit which the other party might have retained. * * * A promise to give something for the compromise of a claim, about which there is merely a dispute and controversy, and for which there is no legal foundation whatever, is not sufficient to sustain a suit at law."

In order that a compromise may constitute a sufficient consideration for the enforcement of an executory contract, there must have been an actual *bona fide* claim, founded upon a colorable right, about which there was room for honest doubt and actual dispute.

Upon the plaintiff's theory the interest coupons were in effect paid by having been satisfied by the purchase of property. In that event there would have been no color or foundation for a dispute or claim. The instructions requested ignored the necessity for even color or foundation for the claim. Because the instructions omit these essentials they were properly refused.

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Other instructions given by the court, and some which were requested by the appellant and refused, are the subjects of discussion in the briefs. Most of these relate to questions which have already been considered in connection with the pleadings and other matters which have preceded. While we have carefully considered the questions made, it would involve a useless repetition to state them all separately, and the reasons upon which we conclude that no error intervened in respect to giving or refusing instructions.

It became a subject of controversy whether, under the contract of agency, Henderson and Jameson had the right to charge the mortgage company for the services for which compensation was claimed, the items of which were comprised by the bill of particulars and the proof in the case.

As has been seen, the agency comprehended by the contract was to make loans of money on bonds and mortgages, and to collect money to become payable on such loans. The contract also provided that the company should not be liable for any charges, disbursements or commissions to their agents "for their services in said agency."

The court put the case to the jury upon the theory that, under the contract, the mortgage company had no right to require the services of Henderson and Jameson, or either of them, without compensation, as to any or either of the following matters :

First. Legal services in foreclosing mortgages or collecting moneys for the company by legal proceedings and actions at law.

Second. Looking after repairs to, and caring for, properties bought in by the company upon foreclosure of its mortgages.

Third. Renting and collecting rents of properties bought in by the company upon foreclosure of its mortgages.

Fourth. Superintending repairs and improvements to, and taking general oversight of, properties in the hands of re-

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ceivers appointed by the courts in cases brought to foreclose mortgages executed to the company to secure loans made by its agents.

Fifth. Looking after the payment of taxes, and the keeping up of insurance, upon properties bought in by the company, upon foreclosure of its mortgages.

Sixth. Looking after the payment of taxes, and keeping up the insurance, upon properties mortgaged to the company to secure loans.

The court instructed the jury that for all services of the character above specified, performed by the agents, or either of them, at the instance and request of the company, the latter became liable to pay a just and fair compensation.

These instructions are covered in principle by what was said in *Union, etc., Ins. Co. v. Buchanan*, 100 Ind. 63-73: "The fact that an attorney is employed as an agent to negotiate loans does not preclude him from rendering professional services, if requested by his principal. Loaning money is one thing; giving advice in matters of law, and conducting suits, are quite different things." So it may be said here, the services enumerated above are services quite different from those comprised by the contract of agency, which related exclusively to loaning money on bonds and mortgages, and collecting moneys payable on loans made. We have discovered no error of law in the record.

In respect to the value of the services, and the diligence exercised by the agents in attending to the company's affairs, there was apparently sharp antagonism. The great length of time occupied with the hearing, and the volumes of evidence taken, attest the care and minuteness of inquiry into all the details of the whole business, which characterized the investigation. A careful consideration of all the questions, which have been very elaborately and carefully presented, fails to disclose any error of law committed by the court; and, while we may say the amount of the recovery (\$12,506.72) seems large, we are unable to see that a different

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result would be reached if a new trial were ordered and the same evidence submitted to a new jury.

The judgment is, therefore, affirmed, with costs.

ELLIOTT, C. J., did not participate in the decision of this case.

Filed May 12, 1887.

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No. 13,579.

ORR v. MEEK, ADMINISTRATOR.

PHYSICIAN.—License.—Compensation.—One who undertakes to practice the profession of medicine, without the license required by statute, can not recover compensation for his services.

SAME.—License Required for Each County in Which Physician Practices.—A physician, who has obtained a license in one county, can not regularly engage in practice in another county without taking out another license.

STATUTE.—Construction.—Forms.—A form prescribed by statute is an essential and controlling part of the statute.

From the Fayette Circuit Court.

C. A. Murray, R. Conner and H. L. Frost, for appellant.
J. I. Little and D. W. McKee, for appellee.

ELLIOTT, C. J.—In the recent case of *Eastman v. State*, 109 Ind. 278, we held, after a full examination of the authorities, that the act requiring physicians and surgeons to obtain a license was constitutional, and it is unnecessary to again discuss that question. In the investigation of the case referred to, we found that the authorities were harmonious in holding acts like ours to be valid and enforceable.

The cases agree in holding that one who undertakes to practice the profession of medicine without the license required by statute can not recover compensation for his services (*Eastman v. State, supra*, and cases cited), and section 5 of the act of April 11th, 1885, expressly declares that no

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recovery can be had for medical services unless a license has been taken out.

What we have said disposes of two of the questions discussed by counsel, and leaves for examination this question: Can a physician, who has regularly obtained a license in one county, practice in another county without taking out another license?

Section 2 of the act of April 11th, 1885, provides, among other things, that "Any person desiring to practice medicine, surgery or obstetrics in this State, shall procure from the clerk of the circuit court of the county wherein he or she desires to practice a license so to do."

Section 4 provides that "Any person who shall practice medicine, surgery or obstetrics in this State without having first procured from the clerk of the circuit court of the county wherein he or she shall so practice a license, as provided in this act, shall be deemed guilty of a misdemeanor."

We can perceive no reason for doubting the correctness of the construction placed upon this statute by the trial court, for it seems clear that a license must be taken out in the county where the physician practices. If, however, there were any doubt as to the meaning of the two sections from which we have quoted, that doubt is removed by the form of the license given in section 6, for the form provides that the person to whom it is issued "is hereby authorized to practice medicine, surgery or obstetrics in said county." Acts of 1885, p. 199.

It was held in *Wasson v. First Nat'l Bank*, 107 Ind. 206, that a form prescribed by statute is an essential and controlling part of the statute, and it must be so held here. The conclusion that the right to regularly practice is restricted to the county in which the license is issued, is irresistible, for the whole scope of the statute, as well as the form prescribed, very clearly shows that the license is confined to the county in which it is procured.

It may be that there are cases where the courts would hold

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that the statute does not apply in its full rigor, as where there is an emergency demanding prompt action, or where there is a professional visit for consultation, or the call is made because of some special skill or ability of the physician, in a particular branch of his profession; but we have here the case of a physician, regularly practicing his profession, and rendering services as in ordinary cases, in a county different from that in which he obtained his license, and to such a case we must apply the statute. If there was any reason for excluding the appellant's case from the general force and effect of the statute, he should have made that reason clearly appear. *Tilford v. State*, 109 Ind. 359.

Judgment affirmed.

Filed May 13, 1887.

No. 12,598.

ZENOR v. JOHNSON ET AL.

REAL ESTATE.—Action to Recover.—Parent and Child.—Evidence.—In an action by a father against a daughter and her husband to recover possession of land and to quiet title, the evidence showed, in substance, that the plaintiff was the owner in fee simple of the real estate; that he was an old man; that he had proposed to his daughter that if she would live with and take care of him during the remainder of his life, he would, at his death, give her all his property, and that she should have the use of all which he did not want to use; that the proposition was accepted, and the daughter and her family moved upon the land and into the plaintiff's house; that a deed from the plaintiff to his daughter had been prepared but never executed.

Held, that the evidence is not sufficient to sustain a judgment for the defendants.

From the Harrison Circuit Court.

G. W. Denbo, W. N. Tracewell and R. J. Tracewell, for appellant.

N. R. Peckinpugh, G. W. Self, W. T. Zenor and D. A. Cunningham, for appellees.

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Howk, J.—In this case, appellant, Zenor, sued the appellees, who were husband and wife, and the daughter and son-in-law of the appellant, in a complaint of three paragraphs. In the first two paragraphs of his complaint appellant sued to recover the possession of certain real estate, particularly described, in Harrison county; and, in the third paragraph, he sought to have his title quieted against the adverse and unfounded claims of the appellees to the same real estate. Appellees jointly answered (1) by a general denial of the first and second paragraphs of complaint, and (2) averring that they were the owners, and in the possession, of the real estate in controversy, they denied all other material allegations of the third paragraph of complaint. Appellant replied by a general denial to the second paragraph of appellees' answer. The issues joined were tried by the court, and a finding was made for appellees, the defendants below; and, over appellant's motion for a new trial, the court adjudged that he take nothing by his suit herein, and that appellees recover of him their costs in this action expended.

In this court, the only error assigned by appellant, the plaintiff below, is the overruling of his motion for a new trial.

Under this alleged error, the first point made by appellant's counsel, in argument, is, that the finding of the trial court was not sustained by sufficient evidence, and was contrary to law. By an unbroken line of record evidence, from the United States Government down to himself, appellant established the fact, alleged by him in each paragraph of his complaint, that he was the owner in fee simple of the real estate described therein. Upon the issues joined on the first and second paragraphs of his complaint, appellant was entitled, therefore, to a finding and judgment in his favor, unless the appellees showed by their evidence that, notwithstanding appellant's ownership of the real estate in controversy, they were entitled to the possession thereof, as against the appellant, at the time this suit was commenced. In their

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answer to the appellant's third paragraph of complaint, the appellees averred, as we have seen, that they were the owners and in the possession of the real estate in controversy, and then denied all other material allegations of such third paragraph. In view of the case made by appellant's evidence in chief, it became and was necessary for the appellees, therefore, in order to defeat appellant's recovery herein, to show by sufficient evidence either (1) that they had acquired title in fee simple to, or (2) that they had acquired and held the right to the possession of, the real estate in controversy, from, through or under the appellant, Zenor.

It was shown by the evidence that appellant, at the time of the trial of this cause, was more than seventy years old, that appellee Frances J. Johnson was his daughter, and that her co-appellee William J. Johnson was her husband and the appellant's son-in-law. In the fall of 1882 appellant's wife departed this life, and at that time appellee Frances J. Johnson, who was his only daughter, and William J., her husband, were residing near the city of Paducah, in the State of Kentucky. Appellant had an only son, Joshua Zenor, who lived near his father. It was further shown that some time before his wife's death, but the precise time was not stated, appellant had made advancements to or settlements upon his two children, and had given appellee Frances J. Johnson a farm, near the land now in controversy. After the death of appellant's wife, he proposed to his daughter, Frances J., that if she would come and live with him, and take care of him during the remainder of his life, he would, at his death, give her all his property, real and personal; that, while he lived, he would buy his own clothing and pay his own "doctor bills," and that she should have the use of all his property which he did not want to use. This proposition was accepted by appellees, and in December, 1882, Mrs. Johnson and her children moved into the appellant's house on the land in controversy, but her husband remained at their home in Kentucky for about one year, when he joined his family, and

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they then lived with appellant in his home until the spring of 1884.

It was further shown by the evidence, that in January, 1883, appellant wrote out, signed and acknowledged the draft of a deed of the land in controversy to his daughter, Frances J. Johnson, and her children at his death, reserving to himself, during his life, the control, possession and use of such land. This deed was not to take effect and become operative until it had been submitted to and approved by William J. Johnson, who was then in Kentucky. When he came home he disapproved the original draft of the deed, for the reason, as stated, that he and his wife could not sell and make title to the land, if they should wish to do so, after appellant's death. It was then agreed that appellant should convey the land to his daughter, Frances J. Johnson, alone, and the original draft of the deed was surrendered and destroyed. A deed of the land to his daughter only was then prepared, but it was never executed by appellant. As a witness in her own behalf, Frances J. Johnson admitted that she knew she was not to get appellant's property until after his death.

We have now given the case substantially as it is made by the evidence appearing in the record; and upon this case, we are of opinion that the finding of the trial court, in appellees' favor, can not be sustained. It is certain, as it seems to us, that the appellees have not, nor has either of them, shown any title to, or right to the possession of, the land in controversy, which they can enforce during the lifetime of appellant, and as against him. In some of its features, the case in hand is not unlike the well-considered case of *Ikerd v. Beavers*, 106 Ind. 483; and much of what is said in the opinion in that case is forcibly applicable to the facts here as we have stated them. This is not a case of conflicting evidence; but it is one where it is shown by the evidence, without any conflict therein, that appellant is the owner in fee simple of the land in controversy, which land the appel-

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lee Frances J. Johnson, as a witness in appellees' behalf, admitted that she was not to get until after appellant's death.

The finding of the trial court was not sustained by the evidence, and for this cause it was error to overrule appellant's motion for a new trial.

The judgment is reversed, with costs, and the cause is remanded for a new trial, etc.

Filed April 28, 1887; petition for a rehearing overruled June 29, 1887.

No. 12,891.

LOW v. DEINER.

INSTRUCTIONS TO JURY.—*Supreme Court.*—*Evidence Not in Record.*—Where the evidence is not in the record, the Supreme Court can not say that instructions given or refused were erroneous.

From the Pulaski Circuit Court.

N. L. Agnew and *B. Borders*, for appellant.

W. Spangler, *H. A. Steis* and *B. S. B. Stamats*, for appellee.

ELLIOTT, C. J.—The questions argued by the appellant's counsel arise on the ruling denying a new trial, but the argument is unavailing, for the reason that the evidence is not in the record.

It is incumbent on the appellant to affirmatively show that the trial court erred in refusing instructions, and this can not be done in such a case as this unless the evidence is in the record, for we can not say that they were not properly refused because not applicable to the evidence; nor can we say, in the absence of the evidence, that the instructions given were erroneous, for there might have been a case under the

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issues in which they would have been entirely proper. *New v. New*, 95 Ind. 366.

Judgment affirmed.

Filed May 14, 1887.

No. 13,588.

BOSWELL v. THE STATE.

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CRIMINAL LAW.—*Former Jeopardy.*—*Plea of Guilty.*—*Dismissal.*—*Practice.*—

Where a defendant is arraigned before a court of competent jurisdiction to hear and determine the charge, and to adjudge the punishment affixed to the offence, and pleads guilty, which plea has been entered and accepted, and all other steps required by law have been taken, so that nothing further remains to be done except to assess the punishment, he has been put in jeopardy, and can not again be put on trial for the same offence.

SAME.—*Assault and Battery.*—B. was charged with assault and battery, by a sufficient affidavit, duly filed. He was arrested on a proper warrant, brought before a justice of the peace having competent jurisdiction to try and determine the charge, and being required to plead entered a plea of guilty, which was entered and accepted by the court with the consent of the State, the prosecuting attorney being present. Afterwards, the injured party being present, the defendant standing on his plea of guilty, and demanding a hearing, the State voluntarily dismissed the prosecution;

Held, that such proceeding was a bar to any further prosecution of B. for the same offence, he having been in jeopardy.

From the Huntington Circuit Court.

J. B. Kenner and J. I. Dille, for appellant.

L. T. Michener, Attorney General, *E. C. Vaughn*, Prosecuting Attorney, *B. M. Cobb*, *C. W. Watkins* and *J. H. Gillett*, for the State.

MITCHELL, J.—On the 2d day of April, 1886, the grand jury of Huntington county returned an indictment into the Huntington Circuit Court against Andrew J. Boswell, for an

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alleged assault and battery upon one Butler. The defendant filed a special plea, the substance of which was, that at a date prior to the returning of the indictment, he had been charged in an affidavit, filed before a justice of the peace of that county, with the commission of the same identical offence, with which he stood charged in the indictment, and that upon a warrant duly issued he had been arrested and taken before the justice, with whom the affidavit had been lodged, and required to plead to the charge. It was further averred that, being so arraigned and required to plead in open court, and in the presence of the prosecuting attorney, the defendant pleaded guilty to the charge, which plea was accepted by the court; and that thereupon, with the consent of the prosecutor, the case was continued until the next day, at 9 o'clock A. M., and a subpoena issued for Thad Butler, the injured party. It is alleged that the witness, Butler, appeared at the time appointed, and, the defendant being ready in court demanding a hearing upon his plea so entered and accepted, the prosecuting attorney voluntarily dismissed the prosecution before the justice. The affidavit and a transcript of the proceedings before the justice are made a part of the special plea. The court sustained a demurrer to the plea, and, upon a plea of not guilty, the defendant was tried, and assessed with a fine of twenty-five dollars and costs.

The only question involved is, did the proceedings before the justice put the appellant in jeopardy, so as to protect him from another prosecution for the same offence?

It is conceded that a sufficient affidavit was filed with a justice of the peace having competent jurisdiction to hear and determine the charge. After being brought before the justice and required to plead, a plea of guilty was entered and accepted by the court, with the consent of the State. Afterwards, the injured party being in attendance, the defendant standing on his plea of guilty and demanding a hearing, the State voluntarily dismissed the prosecution.

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It is too well settled to be open to doubt, that if a defendant has been put upon trial for a criminal offence, or as is sometimes said, if a competent jury has been "charged" with the offence, and a *nolle prosequi*, or anything equivalent thereto, is afterward entered without his consent, he can not be again put upon trial for the same offence. *Hensley v. State*, 107 Ind. 587; *Kingen v. State*, 46 Ind. 132; *Hines v. State*, 24 Ohio St. 134; 1 Bishop Crim. Law, section 1016; Whart. Crim Pl. and Pr., sections 447, 517; Moore's Crim. Law, section 400.

A voluntary dismissal under such circumstances is equivalent to an acquittal.

"If, in a particular case, the jeopardy has attached, though for an instant only," says a learned author, "and there is afterward such a lapse in the proceedings as requires a new jeopardy, in distinction from a continuation of the old, to produce a conviction, the defendant has thereby obtained the right to demand his discharge." 1 Bishop Crim. Law, section 1013.

True, the language found in the books usually is, that jeopardy does not attach unless a jury has been actually empanelled and charged with the offence, but surely this can not mean that a court, without the intervention of a jury, may proceed so far that nothing remains to be done except to assess the amount of punishment, and that the defendant will not have been thereby put in jeopardy. Trial by jury may be waived, or by pleading guilty the necessity for a trial may be wholly avoided, there being in that case no issue to try. Necessarily, therefore, where a defendant is arraigned before a court having competent jurisdiction to hear and determine the charge, and to adjudge the punishment affixed to the offence, and pleads guilty, nothing further remains except to enter the plea and assess the punishment. *Gray v. State*, 107 Ind. 177; section 1767, R. S. 1881.

Of course, the court may hear evidence after a plea of guilty

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in order to determine the amount of punishment, but it can not be said, after a plea of guilty has been entered and accepted by the court, and all other preliminary requisites for a hearing and sentence are ready, that the defendant has not been for an instant in jeopardy, when the court might at any moment have pronounced the sentence of the law upon him. He was in precisely the same jeopardy as if a jury had returned a verdict of guilty, in case the assessment of punishment had been left to the court.

It is said that it does not appear that the defendant objected to the dismissal, and that it may, hence, be considered that he waived his constitutional privilege. Without determining that it was necessary that he should have objected, in order that he might not again be put upon trial, it is enough to say that the plea alleges that he was demanding a hearing on his plea of guilty. This is enough to indicate that the dismissal was not with his consent.

Our conclusion is, since the justice at the time of the dismissal had subpoenaed the injured party, and thus secured his presence, and had proceeded so far that nothing further remained except to pass judgment upon the defendant, that the State could not then dismiss, and bring the appellant to trial again.

The plea shows that the prosecuting attorney was present, representing the State, when the plea of guilty was entered, and that he consented thereto, and that he voluntarily dismissed the case after the injured party was present in court. The suggestion that there may have been fear of collusion between the defendant and the justice is, therefore, without force. If there was any reason to suspect collusion, the prosecutor should have dismissed before arraigning the defendant, or at least before the presence of the injured party left nothing more to be done, except to pronounce judgment.

The judgment is reversed.

Filed May 13, 1887.

Krueger, Adm'r, v. The Louisville, New Albany and Chicago R'y Co.

No. 12,432.

KRUEGER, ADMINISTRATOR, v. THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

MASTER AND SERVANT.—Duty of the Master to Provide Safe Working Places and Machinery.—Negligence.—It is the duty of the master to use ordinary care and diligence to provide safe working places and safe machinery and appliances for his employees, the neglect of which is an actionable wrong, and he can not absolve himself from liability by delegating such duty to an agent.

SAME.—Fellow-Servant.—Vice-Principal.—The negligence of a fellow-servant, or co-employee acting as such, will not authorize a recovery, although he may be a superior officer, an agent or a foreman; but if the superior agent is charged with the performance of the master's duty, to that extent his acts and negligence are those of the master.

SAME.—Railroad.—Master Mechanic.—Fireman.—Defective Locomotive.—By order of the division master mechanic of a railroad company, a tender belonging to one engine was attached to another of different construction, its deck being three to four inches higher than that of the engine. The use of the locomotive as thus constituted was rendered dangerous, by reason of lost motion and the liability of the tender to become detached, and the engineer so notified the master mechanic. While the fireman was engaged in shovelling coal into the fire-box, the engine and tender parted and the fireman was killed.

Held, that the company is liable.

From the Laporte Circuit Court.

D. J. Wile and F. E. Osborn, for appellant.

ELLIOTT, C. J.—The appellant's intestate was in the service of the appellee as a fireman on one of its locomotives, and was killed while discharging the duties imposed upon him by his employment.

There was evidence showing that by order of the division master mechanic of the appellee, James McAuliffe, a tender belonging to engine number 9 was attached to engine number 5; that the deck of the tender was three to four inches higher than the deck of the engine to which it was attached; that this difference in height made the use of the engine and tender dangerous, and that the engineer in charge of the locomotive notified the master mechanic of that fact.

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131	535
111	51
134	158
136	469
111	51
140	653
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151	306
151	306
111	51
153	622
111	51
159	85
159	667
111	51
171	404

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The engineer testified that the difference in height caused an inch of lost motion, and Elijah T. Behan, master mechanic of the Michigan Central Railroad, who had for twenty-two years been acquainted with the construction, use and repairs of locomotives and attachments, testified that "the greatest amount of lost motion permissible is half an inch." Other witnesses testified that the lost motion caused by the attachment of the tender of engine number 9 to engine number 5 caused a much greater degree of lost motion, and rendered the use of the engine and tender dangerous because of the liability of the tender to become detached from the engine.

The appellant's intestate was killed by the parting of the engine and tender, while engaged in shovelling coal into the fire-box of engine number 5. "The engine," as the engineer says, "in an instant, without any warning, broke away from the tender and the rest of the train, and ran about two hundred feet," and the tender and some of the cars ran over the decedent.

It is the duty of the master to use ordinary care and diligence to provide safe working places and safe machinery and appliances for those in his service. A neglect of this duty is an actionable wrong. *Bradbury v. Goodwin*, 108 Ind. 286; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88; *Indiana Car Co. v. Parker*, 100 Ind. 181, and authorities cited p. 187.

This duty rests on the master, and he can not absolve himself from liability by delegating it to an agent. "Where the duty is one owing by the master, and he entrusts its performance to an agent, the agent's negligence is that of the master." *Indiana Car Co. v. Parker, supra*. The negligence of a fellow-servant or co-employee, acting as such, will not authorize a recovery in any case, although the fellow-servant or co-employee may be a superior officer, an agent or a foreman; but, if the superior agent is charged with the performance of the master's duty, then, in so far as that duty is concerned, his acts and his negligence are the acts and the

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negligence of the master, and not simply those of a co-employee or fellow-servant. *Capper v. Louisville, etc., R. W. Co.*, 103 Ind. 305; *Atlas Engine Works v. Randall*, 100 Ind. 293 (50 Am. R. 798); *Indiana Car Co. v. Parker, supra*; *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (273) (38 Am. R. 134); *Mitchell v. Robinson*, 80 Ind. 281 (41 Am. R. 812); *Hough v. Railway Co.*, 100 U. S. 213; *Mullan v. Philadelphia, etc., Co.*, 78 Pa. St. 25 (21 Am. R. 2); *Gunter v. Graniteville, etc., R. R. Co.*, 18 S. C. 262 (44 Am. R. 573); *Crispin v. Babbitt*, 81 N. Y. 516 (37 Am. R. 521); *Flike v. Boston, etc., R. R. Co.*, 53 N. Y. 549 (563) (13 Am. R. 545); *Corcoran v. Holbrook*, 59 N. Y. 517 (17 Am. R. 369); *McCosker v. Long Island R. R. Co.*, 84 N. Y. 77; *Brothers v. Cartter*, 52 Mo. 372; *Tierney v. Minneapolis, etc., R. W. Co.*, 33 Minn. 311 (53 Am. R. 35); *Towns v. Vicksburg, etc., R. R. Co.*, 37 La. Ann. 630 (55 Am. R. 508).

The Supreme Court of Massachusetts was one of the first of the American courts to declare the rule that a master is not liable to a servant for an injury caused by the negligence of a fellow-servant, and by no other court has the rule been more rigidly enforced; yet that court very fully approves the rule asserted by the authorities to which we have referred.

In *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240 (14 Am. Rep. 598), it was said: "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require."

The instructions given in this case assert in most positive terms a doctrine directly contrary to that declared by the cases to which we have referred, for those instructions assert that the company is not liable for the negligence of

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any of its officers, except its board of directors, and assert, also, that no matter what the rank, position or duties of other officers or agents of the company, it would not be liable for their negligence.

We are without a brief from the appellee, and do not know what position its counsel assumed in the court below, but we are clear that, in the respect indicated, the cause was submitted to the jury upon an erroneous theory, and for that reason we reverse the judgment, confining our decision to the one point, declaring that to be the point in judgment.

Judgment reversed.

Filed May 17, 1887.

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No. 12,813.

SCHWAB ET AL. v. LEMON ET AL.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—*Deed.*—*Preference of Creditors.*

—*Fraud.*—A stipulation in a deed of assignment, made under the statute, that certain creditors shall be preferred and paid in full, is controlled and annulled by the statute, and the deed, in the absence of actual fraud, will be upheld as a valid general assignment.

From the Fountain Circuit Court.

L. Nebeker, H. H. Dochterman, N. Morris, L. Newberger and J. F. McHugh, for appellants.

T. F. Davidson and I. E. Schoonover, for appellees.

MITCHELL, J.—Albert D. Lemon, a debtor in embarrassed and failing circumstances, made an assignment of all his property for the benefit of all his creditors. The deed of assignment purports to have been made in pursuance of the statute regulating voluntary assignments. It assumes to make provision for preferring certain of the assignor's creditors, and requires that those mentioned should be paid

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in full. In all other respects the deed conforms to the provisions of the assignment law. The appellants, comprising the firm of Schwab & Bros., filed an intervening petition in the Fountain Circuit Court, in which the matter of the assignment was pending. They set forth that an assignment had been made providing for preferences, and that they were judgment creditors of the assignor, and that their judgment had been recovered since the making of the assignment. It is conceded that the assignment was made, and that the assignee had taken possession of the property in pursuance of the statute regulating proceedings under the voluntary assignment law. The transaction is assailed solely on the ground that the deed makes provision that some of the assignor's creditors should be paid in preference to others, and that the petitioners are of the unpreferred class. The petition charges that the assignment is for that reason void, and it prays that it may be so adjudged, and that the supposed lien of the petitioners' judgment may be recognized as valid and binding against the property of the assignor in the hands of the assignee.

The court sustained a demurrer to the petition and gave judgment, upholding the assignment. The questions involved have all been determined in favor of the ruling below in the recent cases of *Henderson v. Pierce*, 108 Ind. 462; *Redpath v. Tutewiler*, 109 Ind. 248; *Seibert v. Milligan*, 110 Ind. 106.

The conclusion arrived at in those cases was, that, in the absence of actual fraud, a deed of assignment, under the statute, will be upheld as a valid, general assignment, notwithstanding a provision that certain creditors shall be preferred. Such a provision will be controlled and annulled by force of the statute.

Judgment affirmed, with costs.

Filed May 17, 1887.

McBurnie v. Seaton et al.

No. 12,408.

THE STATE, EX REL. NEAL, v. KAMP.

APPEAL.—*Satisfaction of Judgment.—Dismissal.*—Where the judgment appealed from has been satisfied, the appeal will be dismissed.

From the Vanderburgh Circuit Court.

W. F. Smith, for appellant.

S. R. Hornbrook and V. Bisch, for appellee.

ELLIOTT, C. J.—The appellee's motion to dismiss this appeal must be sustained. It is shown, without contradiction, that the appellee has paid, and the appellant has accepted payment of the judgment from which this appeal is prosecuted. There is, therefore, nothing actually in controversy, and in such a case this court will not entertain the appeal. *Monnett v. Hemphill*, 110 Ind. 299. Section 632, R. S. 1881, forbids a party who has received money in satisfaction of a judgment from prosecuting an appeal.

Appeal dismissed.

Filed May 19, 1887.

No. 12,044.

MCBURNIE v. SEATON ET AL.

JUDGMENT.—*Conclusiveness of.—Parties.*—Judgments are presumptively only conclusive against parties in the character in which they sue or are sued.

SAME.—*Estoppel.—Former Adjudication.*—The estoppel of a judgment is only presumptively conclusive where it appears that the suit and the issues were of such a character that the judgment could not have been rendered without deciding the particular matter again brought in question.

ESTOPPEL.—*Former Adjudication.—Pleading.—Answer.—Parties.—Mortgage.—Foreclosure.—Judgment.*—An answer to a complaint, in an action brought by the widow of the mortgagee to foreclose a mortgage given to secure

111	56
128	260
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144	167

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114	305
117	465
121	141
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Case 2	
163	11

McBurnie v. Seaton *et al.*

certain promissory notes, payable to such mortgagee, which alleges that the payee and mortgagee in his lifetime, describing himself as the guardian of certain minor heirs named, instituted a foreclosure suit in the proper court, on the identical notes and mortgage, against the defendants, and that such proceedings were had in that behalf that upon the issues duly joined therein there was a finding and judgment for the defendants, but which does not allege that the merits of the case as to the plaintiff individually were in some way involved in the issues and determined by the prior judgment, is bad on demurrer.

From the Crawford Circuit Court.

N. R. Peckinpaugh and *W. T. Zenor*, for appellant.

B. P. Douglass, *J. L. Suddarth* and *S. M. Stockslager*, for appellees.

MITCHELL, J.—Elizabeth J. McBurnie brought this suit against John Seaton and wife to foreclose a mortgage. It appeared in the complaint that Seaton became indebted to William J. McBurnie, in his lifetime, to the amount of seven hundred and fifty dollars. This indebtedness was secured by four notes, payable to McBurnie, and signed by Seaton. The notes were secured by a real estate mortgage, signed by Seaton and wife.

After the death of McBurnie, which is alleged to have occurred in 1880, the notes and mortgage were regularly set off to his widow, who brought this suit.

The defendants answered that on the 15th day of September, 1878, William J. McBurnie, describing himself as guardian of the minor heirs of William J. Fields, deceased, instituted a foreclosure suit on the identical notes and mortgage, in the Crawford Circuit Court, against Seaton and wife, and that such proceedings were had in that behalf as that, upon issues duly joined, there was a finding and judgment for the defendant. Prayer that the plaintiff be held estopped, as by a former adjudication.

After the overruling of a demurrer to this answer, the plaintiff replied in substance, that the prior action was prosecuted by William J. McBurnie solely in the character of

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guardian of the minor heirs of William J. Fields; that the defendants in that action answered certain items of indebtedness, amounting to \$168, owing by William J. McBurnie, in his individual capacity, to John Seaton, and that the court, at the former hearing, did not hear any evidence, or consider or determine any questions, except such as related to the one subject, and that was whether or not William J. McBurnie, as guardian, in his trust capacity, could maintain a suit to recover on the notes and mortgage.

It was averred that the court gave judgment against the plaintiff solely on the ground that he had no right so to maintain the suit, and that the merits of the case were in nowise involved in the pleadings further than the set-off of \$168, heretofore mentioned, and that they were in nowise considered or determined therein.

This reply was held insufficient, and judgment was given against the plaintiff.

As it appeared upon the face of the answer that William J. McBurnie sued in the character of guardian, it was necessary, in order to have made a good plea of estoppel by former adjudication, that it should have been averred that the merits of the case, as to the plaintiff individually, were in some way involved in the issues and determined by the prior judgment. The notes, on their face, were payable to William J. McBurnie. A suit by the payee, as guardian, did not necessarily involve the merits of the case so as to determine his right to recover in his individual capacity.

The general rule has often been recognized by this court, the effect of which is, that judgments are presumptively only conclusive against parties in the character in which they sue or are sued. *Lord v. Wilcox*, 99 Ind. 491; *Erwin v. Garner*, 108 Ind. 488; *Bumb v. Gard*, 107 Ind. 575; *Freeman Judgments*, sec. 156.

The estoppel of a judgment is only presumptively conclusive where it appears that the suit and the issues were of such a character that the judgment could not have been

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rendered without deciding the particular matter again brought in question. *Packet Co. v. Sickles*, 5 Wal. 580.

Doubtless, issues might have been so framed in the suit by McBurnie as to have involved his right to recover either as guardian or in his individual capacity. In the absence of averments showing that his individual rights were so involved and determined, no such presumption would be indulged.

The demurrer to the answer was, therefore, improperly overruled. That the court below still more certainly erred in holding the reply insufficient, follows necessarily from what has preceded. The reply set up affirmatively that the previous action involved only the rights of McBurnie, as guardian, and not his individual rights.

The judgment is reversed, with costs.

Filed May 19, 1887.

No. 12,517.

PEARCY v. THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY.

JUROR.—*Examination of, on Voir Dire.*—*Misconduct.*—*Duty of Juror.*—*Practice.*

—In the examination of a juror upon his *voir dire*, if the general question asked fairly arouses his attention and directs it to the information desired, it is enough without specific questions covering minute phases of the subject, and it is the duty of the juror to make full and truthful answers, neither falsely stating any fact nor concealing any material matter within the general scope of the question, and any violation of this rule is such misconduct as is prejudicial to the party.

SAME.—*New Trial.*—*Insurance.*—In an action against a life insurance company to recover upon a policy of insurance, where a juror, in response to a question asked in the examination of the jury as to whether he held a policy of insurance issued by the defendant, answered in the negative, the truth being that he had taken out such a policy on his life for the benefit of his wife, the plaintiff having no knowledge of the fact, he is guilty by reason of such concealment of such misconduct

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as entitles the plaintiff to a new trial, notwithstanding his affidavit and those of his fellow-jurors, that in arriving at their verdict they were guided solely by the law and evidence.

From the Jasper Circuit Court.

E. P. Hammond and *W. T. McNeil*, for appellant.

W. S. Hartman and *W. H. Hamelle*, for appellee.

ELLIOTT, C. J.—The appellant's complaint is based on a policy of insurance issued by the appellee on the life of John Percy, the husband of the appellant.

The appellant asks a new trial for the reason, among others, that Ezra Bowman, one of the members of the jury, was incompetent, and because he was guilty of misconduct. In the affidavits filed by the appellant it is stated that each of the jurors was asked "whether he or any of his family held any life insurance policy issued by the defendant," and that each of the jurors answered that neither he nor any of his family held a policy. The affidavits filed by the appellee state that the question asked each of the jurors was: "Do any of you hold a policy of life insurance issued by the defendant, the Michigan Mutual Life Insurance Company?" and that the jurors were not asked: "Do you, or any member of your family, hold such a policy." It was further shown that Ezra Bowman had taken out a policy on his life for the benefit of his wife, that the policy was in force at the time of the trial, and that the fact that such a policy was issued was unknown to the plaintiff and her attorneys until after the trial. In the affidavit filed by Bowman he states that the question asked was: "Do you hold a policy of life insurance issued by the Michigan Mutual Insurance Company?" but he does not deny that he had taken out a policy for the benefit of his wife. He and the other jurors swear, that in rendering their verdict, they were influenced solely by the law and the evidence.

It is of high importance to a litigant that the triers of his cause should be impartial and disinterested men, and the

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law makes careful provision for securing him this right. In speaking of this right the Court of Appeals of New York said: "The object of the law is to procure impartial, unbiased persons for jurors. They must be *omni exceptione majores*. They must have no interest in the subject-matter of the litigation." *Diveny v. City of Elmira*, 51 N. Y. 506. The Supreme Court of Nebraska declared a like doctrine in *Ensign v. Harney*, 15 Neb. 330 (48 Am. R. 344), where it was said: "Unless fair-minded, unbiased jurors can be selected, a trial becomes a mere farce, dependent not upon the merits of the case, but upon extraneous circumstances, such as the bias, prejudice, or interest of the jury. To determine the competency of a juror, an oath is administered to him and he is required to answer all questions touching his qualifications as a juror, not generally, but in that particular case. Great latitude is allowed in such an examination, and if it appears probable that the juror is not indifferent between the parties, he is excluded."

Other courts have asserted a similar doctrine; thus, in *Bradbury v. Cony*, 62 Maine, 223 (16 Am. R. 449), the court said: "In the trial of a cause, the appearance of evil should be as much avoided as evil itself. It is important that jurymen should be devoid of prejudice. It is hardly less so, that they should be free from the suspicions of prejudice."

So, in *Melson v. Dickson*, 63 Ga. 682 (36 Am. R. 128), it was said: "A big part of the battle is the selection of the jury, and an impartial jury is the corner-stone of the fairness of trial by jury."

The principle is so plain and just that it needs little more than a bare statement, and we refrain from further reference to authorities, although they are very abundant.

The examination of a juror on his *voir dire* has a two-fold purpose, namely, to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law. It is often important that a party should know

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the relation sustained by a person called as a juror to his adversary, in order that he may interpose a challenge for cause, or exercise his peremptory right to challenge. It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact nor concealing any material matter, since full knowledge of all material and relevant matters is essential to a fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge. In this instance the appellant had a right to a full and truthful answer from Bowman, and it was his duty to make that answer without evasion, equivocation or concealment.

We think that the question asked the juror required him to answer as to the policy taken out on his own life for the benefit of his wife. This is our conclusion upon the assumption that the question was that which the appellee maintains it was. It was not incumbent upon the appellee to minutely cover by a long series of specific questions all phases of the subject, but it was enough to ask such a question as would indicate to the mind of a fair and reasonable man what information the examining counsel sought to elicit. It seems clear that such a question as that asked Bowman ought to have drawn from him the fact that he had taken out a policy on his own life for the benefit of his wife, for the question certainly indicated that information as to his interest in the company, as well as his connection with it, was sought by the counsel conducting the examination.

The authorities support our conclusion that if the general question fairly arouses the juror's attention and directs it to the information desired, it is enough without specific questions covering minute phases of the subject.

In *Rice v. State*, 16 Ind. 298, the juror was asked as to whether he had formed an opinion, and he answered that he

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had not, but no inquiry was made as to whether he had served on the grand jury which found the indictment, and yet it was held, on proof that he had been a member of the grand jury, that the accused was entitled to a new trial. The general question here under discussion was well and elaborately discussed in the case of *Block v. State*, 100 Ind. 357. In that case no inquiry was made as to whether any of the jurors was a deputy of the prosecuting attorney, and yet a new trial was ordered on its being shown that one of the jurors was the prosecutor's deputy.

In *Lamphier v. State*, 70 Ind. 317, a juror was asked generally as to whether he was a freeholder or householder, and, by reason of an erroneous opinion, he gave an incorrect answer, yet it was held that the accused was entitled to a new trial.

It is true that in exact technical strictness the policy belongs to the beneficiary. *Wilburn v. Wilburn*, 83 Ind. 55; *Pence v. Makepeace*, 65 Ind. 345. But in the examination of jurors it is not essential that counsel should employ terms with strict accuracy, for all that need be done is to fairly call the juror's attention to the subject on which information is sought, and indicate to him with reasonable certainty and clearness the purpose of the question. It is common for one who has his life insured for the benefit of his wife or family to regard himself as holding the policy. Nothing, indeed, is more common than for one who has insured his life for the benefit of his family to speak of himself as having the policy, and very few men, if asked the question if they had a policy in a designated company, would think of giving any other answer than that they did have such a policy, even though the policy was payable to some one else. In a broad sense, a man whose life is insured has a policy, although the beneficial interest in it may be in another person, for the policy which expresses the contract is on his life, and he it is that the company insures. We regard it as quite clear that the question asked Bowman required him to

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answer as to a policy taken out on his own life, although that policy was for the benefit of his wife.

The statement of Bowman, that he was influenced solely by the law and the evidence, does not remedy the wrong. A juror who has deceived or misled the court, or the counsel, by a false or incorrect answer, can not, by a subsequent statement, repair the legal injury caused by his conduct on his preliminary examination. *Hudspeth v. Herston*, 64 Ind. 133; *Lamphier v. State*, *supra*; *Block v. State*, *supra*; *Territory v. Kennedy*, 3 Mont. 520; *United States v. Upham*, 2 Mont. 170.

There are many cases in which the social and business relations between the juror and a party will sustain a challenge for cause, and the authorities go very far toward establishing a rule which would make an interest such as that held by Bowman a cause for rejecting the juror. *Davis v. Allen*, 11 Pick. 466; *Thom. & Merr. Juries*, section 179; *Proff. Jury Trials*, section 177. But we need not and do not decide whether the interest of Bowman was such as would have warranted a challenge for cause, for it is enough for the present to decide that the information sought by the question was relevant and material for the purpose of enabling the appellant to intelligently exercise her right to interpose a peremptory challenge.

We have not discussed the questions sought to be presented on the pleadings, for the reason that the record is so confused as not to present them properly, and for the additional reason, that some of these questions are rendered immaterial by the answers to interrogatories returned by the jury.

Judgment reversed.

Filed May 18, 1887.

Fries v. Brier et al.

No. 12,690.

FRIES v. BRIER ET AL.

DRAINAGE.—*Repair of Ditches by County Surveyor.*—Act of April 6th, 1885, Constitutional.—Section 10 of the act of April 6th, 1885, making it the duty of the county surveyor to keep ditches in repair, giving him power to assess the cost upon the lands adjudged benefited in the original proceedings establishing such ditches, and providing for notice of the assessments and for an appeal to the circuit court by any person aggrieved, is constitutional.

SAME.—*Limit of Surveyor's Authority.*—The authority of the county surveyor, under the statute in question, is strictly limited to keeping ditches in repair to the dimensions, as to width and depth, as required in the original specifications.

From the Hancock Circuit Court.

E. Marsh and *W. W. Cook*, for appellant.

W. H. Martin, for appellees.

MITCHELL, J.—Charles H. Brier and twenty other land-owners commenced this action to enjoin the county surveyor of Hancock county from proceeding to repair a certain ditch which had been established and constructed under the order and judgment of the Hancock Circuit Court. So far as appears the surveyor was proceeding according to the provisions of section 10 of the act approved April 6th, 1885. This section makes it the duty of the county surveyor of any county in which proceedings for the construction of a ditch were had, to “keep the same in repair to the full dimensions, as to width and depth, as required in the original specifications.” It also prescribes the duties of the surveyor, in respect to apportioning and assessing the cost of the repairs, upon the lands adjudged in the original proceeding benefited, in proportion to the benefits assessed in the first instance. The surveyor is required to give notice of the assessments, and an appeal to the circuit court is authorized to be taken by any person aggrieved.

The court overruled a demurrer to the complaint, and the

111	65
112	311
113	302
114	365
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115	472
115	538
117	4
111	65
127	205
111	65
131	406
111	65
138	116
111	65
154	620

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appellant refusing to plead further, the surveyor and contractor were enjoined from proceeding to make the repairs, and from apportioning the cost thereof upon the appellees' lands.

In support of the ruling of the court, the appellees contend that the section above mentioned, which purports to confer authority upon the county surveyor to keep ditches in repair, is unconstitutional, and that, hence, the surveyor was proceeding without warrant to impose a burden upon their real estate.

The court below proceeded upon the theory that the complaint brought the case within the principles which ruled the cases of *Campbell v. Dwiggins*, 83 Ind. 473, and *Tyler v. State, ex rel.*, 83 Ind. 563. In these cases sections 4282 and 4307, R. S. 1881, which attempted to authorize township trustees to keep drains in repair and free from obstructions, and to assess the cost thereof upon the lands benefited, according to their judgment in each case, were held unconstitutional, because, in effect, the attempt was thereby made to confer authority to impose an assessment upon land without notice to and a hearing, or an opportunity to be heard, on the part of the owner of the property to be assessed. The effect of the proceedings under these sections was virtually to deprive the owner of his property without due process of law.

The right of the property-owner to have notice and to be heard before his property can be taken, or before a burden can be imposed upon it, must be provided for at some proper stage of the proceedings, and any enactment which attempts to justify a tax or assessment without making such provision is universally regarded as an infringement of the Constitution. *Whiteford Tp. v. Probate Judge*, 53 Mich. 130.

The statute under which the proceedings assailed by the complaint in the case before us were being taken, makes provision for notice and authorizes an appeal, and, consequently, makes ample provision for a hearing. The questions pre-

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sented on this appeal came under consideration in the recent case of *State, ex rel., v. Johnson*, 105 Ind. 463. The conclusion was there reached, that the section of the statute in question was not obnoxious to any of the constitutional infirmities which invalidated the previous enactment referred to, and which are the same in effect as those urged against it in the elaborate argument presented on behalf of the appellees here. The reasoning in that case embraces all that can be profitably said on the subject, and meets all the objections urged against the validity of the statute in question. It is proper to say the judgment in this case was rendered and the appeal taken before the case referred to was decided by this court.

The first paragraph of the complaint charges, among other things, that the plans and specifications which the county surveyor has prepared, and in accordance with which the contemplated repairs are about to be made, will greatly enlarge the ditch as originally constructed; that, instead of repairing and cleaning out the old ditch, as originally established under the order of the court, the purpose and plans of the surveyor contemplate the deepening and widening of the ditch, without any petition, or other proceedings had in court for that purpose. The authority of the county surveyor over the subject of keeping ditches in repair, is strictly limited, in the section above mentioned, to keeping them "in repair to the full dimensions, as to width and depth, as required in the original specifications."

The proceeding is wholly statutory, and not according to the course of the common law. To say the least, the statute confers upon county surveyors powers of a somewhat extended and anomalous character. His authority and proceedings must, therefore, be confined within and conform strictly to the statute.

It would by no means be competent for a county surveyor, under the guise of keeping a ditch in repair, to enter upon a scheme of widening and deepening the drain, no matter

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how desirable it might be to attain that end. When a ditch is established and constructed under the order of the court, it is then judicially determined that its width, depth and other characteristics, as described in the original proceedings, will constitute a sufficient drain for the purposes intended. These can only be changed by judicial intervention. Of course such widening as necessarily results from restoring or repairing the disturbed sides of the drain, where disturbances have occurred, must have been contemplated.

The paragraph under consideration does not state what the width or depth of the drain, as originally constructed, was, nor does it state the width or depth which it is proposed, by the plans under contemplation, to make it. The averments in that regard are too much in the nature of conclusions to justify the interference of the court. Besides, the contract between the surveyor and contractor, a copy of which is set out with the complaint, does not indicate that the parties contemplated the widening or deepening of the drain. The contract purports to be a contract to repair the ditch.

The conclusions already reached render it unnecessary that we should consider some minor questions suggested in the argument.

The judgment is reversed, with costs, with directions to the court below to sustain the demurrer to the complaint.

Filed May 18, 1887.

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167	272
f167	274

 No. 12,734.

GOODWINE v. MOREY.

REAL ESTATE.—*Executory Contract to Convey.*—*Suit to Enforce.*—*Tender of Deed.*—*Complaint.*—Where the vendor seeks to enforce an executory contract for the conveyance of land, the complaint must aver a tender of a sufficient warranty deed, and the tender must be kept good by bringing

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the instrument into court, or by an averment of a readiness and willingness to execute a deed that will vest title in the purchaser.

From the Benton Circuit Court.

M. H. Walker and *I. H. Phares*, for appellant.

T. L. Merrick and *H. S. Travis*, for appellee.

ELLIOTT, C. J.—The appellee alleges in his complaint that he entered into a parol contract with the appellant, wherein he agreed to sell the latter a tract of land; that part of the consideration was paid and possession of the land was taken under the contract. It is not averred in the complaint that the appellee has any title to the land, or that his deed will convey any, and the averment as to the tender of the deed reads thus: "That before the bringing of this suit the plaintiff executed and tendered to the defendant a good and sufficient deed of general warranty." The prayer of the complaint is for a personal judgment, and for the enforcement of a vendor's lien.

Our decisions declare that where the vendor seeks to enforce an executory contract for the conveyance of land, he must have a perfect title to the land at the time the purchase-money becomes due, and must, also, tender a warranty deed to the purchaser. *Small v. Reeves*, 14 Ind. 163; *Parker v. McAlister*, 14 Ind. 12.

In *Mix v. Ellsworth*, 5 Ind. 517, a great number of cases are collected, and it was there held that an action for the recovery of purchase-money could not be maintained unless a deed had been tendered; but in most of the cases there cited the question arose on a plea, so that those cases can not be regarded as fully in point here. The question as it is here presented, however, came directly before the court in *Melton v. Coffelt*, 59 Ind. 310, and it was decided that the pleading must aver a tender of a sufficient warranty deed, and that the tender must be kept good by bringing the deed into court, or by an averment of a readiness and willingness to execute a deed that would vest title in the purchaser. Under the

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rule declared in the case last cited, the complaint must be held bad. There are other cases in our reports which declare a like doctrine. *Cook v. Bean*, 17 Ind. 504; *Mather v. Scoles*, 35 Ind. 1; *Smith v. Turner*, 50 Ind. 367; *Sowle v. Holdridge*, 63 Ind. 213 (218); *Overly v. Tipton*, 68 Ind. 410 (414).

Judgment reversed.

Filed May 20, 1887.

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No. 11,968.

WILLIAMS v. LESLIE.

PRINCIPAL AND AGENT.—*Real Estate Broker.*—*Commission.*—*Contract.*—

Where an agency to sell land is limited to nine months, but it is stipulated in the contract that if a customer is introduced through the agency of the broker, and a sale is afterwards consummated with such customer, the owner shall pay a commission, whether the time of the agreement shall have expired or not, the broker may recover the commission if, during his agency, he introduces a customer to whom the land is afterwards sold, whether the sale is ultimately consummated through his instrumentality or otherwise.

From the Daviess Circuit Court.

W. R. Gardiner and *S. H. Taylor*, for appellant.

J. H. O'Neill and *D. J. Hefron*, for appellee.

MITCHELL, J.—On the 15th day of April, 1882, James Williams and Alexander Leslie made a written agreement by which Williams employed Leslie, upon certain stipulated terms, to sell, or introduce to him a purchaser who would thereafter purchase the farm owned by the former in Daviess county.

The contract provided that in the event of a sale brought about through the agency of Leslie, the latter was to receive as compensation four per cent. of the purchase-price of the

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land, reckoned at \$75 per acre, or at such price as Williams should accept therefor. It provided further, that if a sale was brought about outside of the influence of Leslie's agency, or if the real estate was withdrawn from the market, within a period of nine months from the date of the contract, the agent was to be paid 2 per cent. commission nevertheless, and if the agent produced a purchaser for the land at the price, and upon the terms named, within the time specified, and the owner refused to complete the sale, he agreed to pay the agent full commission. The contract closed thus: "If a customer is introduced through the agency of the said Leslie, and a sale is afterwards consummated with such customer, I agree to pay the commission before mentioned whether the time of this agreement shall have expired or not."

In a complaint upon the foregoing contract, Leslie alleged that during the existence of the agency, he advertised the land for sale, and made a trip to the State of Ohio, taking Williams with him. He alleges that he introduced a Mr. Shepard to Williams, and that, as a consequence of being so brought in communication with each other, the latter consummated a sale of his land to the former, at the agreed price of \$21,000. His claim is that Williams thereby became indebted to him for the commission stipulated in the contract.

The propriety of the ruling of the court in overruling a demurrer to the complaint is the only question presented.

The appellant claims, that by a fair construction of the contract, he was not liable to pay a commission unless a sale was effected, or a purchaser produced, within nine months from the date of the contract, and that as it does not appear from the complaint when the agent produced the purchaser, it did not state a cause of action on the contract.

We do not concur in this view. In effect, the contract was, that if the owner withdrew the land from sale, or effected a sale outside of the appellee's agency within nine months, he was nevertheless to pay the agent 2 per cent. commis-

sion on an estimated or agreed price for the land. This was doubtless intended to indemnify the agent for the cost of properly advertising the property, and putting it before the public for sale. In consideration of the agent's diligence in that regard, the owner of the land agreed that whether he withdrew it from sale, or sold it himself, or through any other agency, within the space of nine months, he would in any event pay the appellee a stipulated commission. After the expiration of nine months, if a sale had not been consummated meanwhile, the agent took the chance that his principal might withdraw the property from sale, or sell it himself, or by any other agency, without liability to him, subject only to the contingency provided for in the last clause of the contract.

The effect of that clause was, that in the event of a sale, where, or by whomsoever consummated, if made to a customer introduced through the agency of Leslie, that is, if the latter was the producing cause of the sale, he was to have his commission. The complaint alleges that the sale was consummated to a customer introduced through Leslie's agency. He was the efficient cause of bringing the vendor and purchaser together. By the very terms of the contract he was entitled to compensation, whether the sale was consummated within nine months or not.

The agent was entitled to his commission when he had procured and introduced a party with whom his principal was satisfied, and who actually purchased the property at a price satisfactory to the owner. Wharton Agency, section 328.

The complaint stated a good cause of action, and there was no error in the ruling of the court.

Judgment affirmed, with costs.

Filed May 20, 1887.

Faurote et al. v. The State, ex rel. Saxon.

No. 12,302.

111	73
117	477

FAUROTE ET AL. v. THE STATE, EX REL. MILES.

From the Henry Circuit Court.

J. A. New and J. W. Jones, for appellants.*D. S. Morgan*, for appellee.

MITCHELL, J.—This was a suit brought on the relation of Richard S. Miles, against Faurote and Brown as principals, and Lewis, Brown and Cranor as sureties, on a certain bond executed by them to secure the completion of a gravel road in Rush county. The action was brought to recover for work and labor performed by the relator in the construction of the work, and also to recover for work and labor, materials furnished, etc., by others, whose accounts had been assigned to the relator.

The facts specially found by the court show, that the contract for the construction of the gravel road had been duly awarded to Faurote and Brown, and that they had executed a bond payable to the commissioners of Rush county, to secure the completion of the contract.

After the contract had been let and the bond executed, the work was sublet by the contractors to one Thomas Cooney, who agreed with them to furnish all the materials, tools and labor, and construct and complete the work, according to the contract and specifications. All the debts sued for were contracted by Cooney, while engaged in constructing the work, the finding being that "said Faurote and Brown did not incur or contract any of the indebtedness sued on in this action."

The conclusions of law stated by the court were, that Faurote and Brown, and their bondsmen, were nevertheless liable on the bond for the indebtedness so contracted.

The pleadings and special finding of facts present the same questions as those considered in the case of *Faurote v. State, ex rel.*, 110 Ind. 463.

Upon consideration of the question of the liability imposed by a bond such as that sued on, we arrived at the conclusion in the former case, that the bond constituted a guaranty for the faithful performance of the work, and that the contractor should pay all debts incurred by him in the prosecution thereof, and that hence the liability upon the bond did not extend to debts incurred by a sub-contractor.

Adhering to the conclusion reached in that case, it follows that in the case before us we must hold that the court erred in its conclusion that the plaintiff below was entitled to recover from the bondsmen the debts incurred by the sub-contractor, Cooney.

Judgment reversed, with costs.

Filed May 14, 1887.

No. 12,438.

FAUROTE ET AL. v. THE STATE, EX REL. SAXON.

From the Henry Circuit Court.

J. A. New and J. W. Jones, for appellants.*D. S. Morgan*, for appellee.

MITCHELL, J.—It is conceded that the questions presented by the record in this case are identical with those presented and determined in the case of *Faurote v. State, ex rel.*, 110 Ind. 463.

For the reasons given in that case the judgment is reversed, with costs.

Filed April 20, 1887.

111	74
112	287
113	457
113	506
114	105
114	455
117	70
123	165
111	74
125	494
111	74
142	135
111	74
147	228
111	74
133	404
111	74
170	674

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1887, IN THE SEVENTY-FIRST
YEAR OF THE STATE.

No. 12,370.

POST, ADMINISTRATOR, v. LOSEY ET AL.

MARRIED WOMAN.—*Surety for Husband.*—*Mortgage.*—A mortgage executed in 1875 by a married woman upon her separate property to secure her husband's debt, was valid, under the law then in force.

SAME.—*Extension of Time of Payment of Debt.*—*Release of Surety.*—A wife, who is surety for her husband, will be released from liability the same as any other surety, by an extension of the time of payment of the debt without her consent, and the lien of a mortgage executed by her to secure it will be discharged.

SAME.—*Mortgagee Bound to Inquire as to Consideration of Mortgage.*—A person who accepts a mortgage upon the land of a married woman, knowing her to be married, and that the land is her separate property, is bound to inquire as to the consideration, and unless misled by her conduct or representations, he will be held to have acquired knowledge of the facts which prudent inquiry would have disclosed.

PRINCIPAL AND SURETY.—*Mortgage.*—*Bankruptcy.*—*Discharge of Principal.*—The lien of a mortgage given by a surety to secure a debt of the principal, is not released by the latter's discharge in bankruptcy.

SAME.—*Discharge of Bankrupt as to Surety.*—*Proof of Claim.*—A debtor is

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relieved from liability to his surety by his discharge in bankruptcy, whether the surety proved the debt against his estate or not.

SAME.—*Moral Obligation of Bankrupt to Pay Debt.—Consideration for New Promise.*—After his discharge in bankruptcy a debtor is released from legal liability to pay a prior debt, but not from the moral obligation, and the latter will constitute a sufficient consideration for a promise to pay such debt.

SAME.—*Agreement to Extend Time of Payment.—Endorsement on Note.—Alteration of Contract.*—Where, after his discharge in bankruptcy, the principal debtor and the creditor agree to an extension, for a definite period, of the time of payment of the debt, and to a reduction in the rate of interest, in consideration of which the former agrees to pay the debt at the time stipulated, and the agreement is endorsed on the back of the note originally given, the face of the note and the endorsement are to be construed together, and together they constitute the contract between the parties. *Huff v. Cole*, 45 Ind. 300, and *Bucklen v. Huff*, 53 Ind. 474, distinguished.

SAME.—*Husband and Wife.—Mortgage.—Alteration of Contract.—Release of Surety.*—Where a married woman, in 1875, as surety, joined her husband in the execution of a promissory note, and executed a mortgage upon her separate property to secure it, and the husband was subsequently discharged in bankruptcy, after which, the creditor having knowledge of all the facts, an agreement to extend, for a definite period, the time of payment of the note and to reduce the rate of interest, in consideration of which the husband stipulates to pay the debt, is entered into between the creditor and the husband, without the wife's consent, and endorsed upon the back of the note, there is such an alteration of the contract as releases the wife's property from liability.

From the Marion Superior Court.

S. Claypool and *W. A. Ketcham*, for appellant.

C. Byfield and *L. Howland*, for appellees.

ZOLLARS, C. J.—On the 2d day of September, 1875, Robert C. Losey, for his own use and benefit, borrowed of appellant's decedent, Jacob Hubner, a sum of money to be repaid in three years.

As evidence of the debt created by the loan, Robert C. Losey and his wife, Emma J., appellee herein, executed and delivered to said decedent a promissory note. At the same time, and to secure payment of the note, Emma J., her husband, Robert C., joining, executed and delivered to said de-

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cedent a mortgage upon her separate real estate. She executed the note and gave the mortgage as surety for her husband, and in no other capacity, the money neither having been borrowed nor used by her, nor used for her benefit in any way to make her property primarily liable.

On the 6th day of August, 1878, Robert C. Losey was discharged in bankruptcy from all of his debts, including said note.

On the 29th day of September, 1878, he and the decedent, payee of the note, without the consent or knowledge of Emma J., entered into an agreement, which they endorsed upon the back of the note, as follows:

“In consideration of the extension of time for three years from September 2d, 1878, and the reduction of the rate of interest from ten per cent. to six per cent. per annum, I hereby assume to pay promptly the interest at six per cent. semi-annually, and the principal of the within note on or before September 2d, 1881. R. C. LOSEY.”

Subsequent to said agreement Robert C. paid several instalments of interest on the note. At the time the note and mortgage were executed, and at the time the above written agreement was made, the payee and mortgagee knew that Robert C. and Emma J. Losey were husband and wife; that the real estate mortgaged was her separate property, and that she executed the note and mortgage as surety for her husband, and in no other capacity.

The above are substantially the facts specially found by the court below. Upon those facts the court rendered judgment in favor of the plaintiff, against Robert C. Losey, for the amount of the note, and for Emma J. for costs, having concluded as a matter of law that, by reason of the foregoing facts, the mortgage was discharged and satisfied, and her real estate released.

The question for decision here concerns the rights of the wife, Emma J. Under the present statutes, a wife may not mortgage her separate property to secure her husband's debts.

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The mortgage in suit was executed in 1875. Under the statutes then in force, such a mortgage was valid. Its validity was not affected by the change in the statutes. It is well settled that a wife who has mortgaged her separate property for her husband's debt, when she may do so, is in the position of a surety, and entitled to all the rights of a surety, and that her liability and the mortgage lien are discharged by an extension of time of payment without her consent, if the extension be a binding obligation upon the mortgagee. Her rights in this respect are the same as if she were sole. *Trentman v. Eldridge*, 98 Ind. 525 (534), and cases there cited; *Bank of Albion v. Burns*, 46 N. Y. 170; *Smith v. Townsend*, 25 N. Y. 479.

Relying upon this rule of law, counsel for Emma J. contend that the agreement between the husband and the decedent, the payee, endorsed upon the back of the note, operated as an extension of the time of payment, and thus released her property.

In response to that contention, counsel for appellant contend, in the first place, that the evidence does not show that the decedent, payee, at any time had notice that Emma J. was surety for her husband, and that, hence, she can not avail herself of the rule which releases a surety by an extension of the time of payment; and, in the second place, that she can not avail herself of that rule for the reason that the husband had been discharged in bankruptcy, and thereby became a stranger to the note. These in their order. In order that an extension of the time of payment may release the surety, it is essential that the payee shall have knowledge of the suretyship. *Davenport v. King*, 63 Ind. 64; *McCloskey v. Indianapolis, etc., Union*, 67 Ind. 86 (33 Am. R. 76); *Arms v. Beitman*, 73 Ind. 85; *Gipson v. Ogden*, 100 Ind. 20.

When, however, a person accepts a mortgage in his favor upon the separate property of a married woman, knowing her to be a married woman, and that the property is her separate property, he is bound to inquire concerning the con-

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sideration, and ascertain, if he may, by reasonable inquiry from her, whether it is for the benefit of another; and unless misled by the conduct or representations of the wife, he will be held to have acquired knowledge of the facts which prudent inquiry would have discovered. *Cupp v. Campbell*, 103 Ind. 213. See *Smith v. Townsend*, *supra*.

Under this rule, and under a less liberal rule, there is evidence sufficient to justify the court below in finding that the payee knew that Emma J. was a married woman, and that she was mortgaging her separate real estate to secure a debt of her husband, notwithstanding she signed the note with him. Being a married woman, she was not personally liable upon the note.

There was in the mortgage an agreement to pay the amount thereby secured. That agreement made the mortgage effective so far as the right to foreclose was concerned, but created no personal liability against her. *Trentman v. Eldridge*, *supra*. Robert C. Losey was discharged in bankruptcy from all his debts, including that for which the mortgage in suit was given. That discharge released him absolutely from all legal and personal liability upon the note, and the agreement to pay contained in the mortgage. *Root v. Espy*, 93 Ind. 511. Ordinarily a surety is released when the debt for which he is surety is discharged; and ordinarily a mortgage given to secure the payment of a debt, and having in it no promise to pay such debt, becomes ineffectual, and is barred when the debt is barred or in any way discharged. *Lilly v. Dunn*, 96 Ind. 220; *Bridges v. Blake*, 106 Ind. 332.

Those general rules apply where the discharge of the principal debt and debtor is by some act or neglect of the creditor, and not to a discharge by operation of law, being as it is, against the consent and beyond the power of the creditor. *Phillips v. Solomon*, 42 Ga. 192. In speaking of the rights and liabilities of sureties, and the effect of the bankrupt law thereon, the court there said: "We are inclined to think * * * that it was not the intent of Congress to do anything

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more than to declare that the *act* should not be *construed* so as to discharge sureties, and that this was done not so much to fix the law of the case, as by way of caution to prevent the act from being construed to have an effect that, by its terms, it would not have. In other words, the *contract* of a surety, as it is understood in the commercial world, is always conditioned that the surety shall *not* be discharged by the bankruptcy of the principal."

It was further said that the sections of the bankruptcy law upon the subject of sureties were only in furtherance, and declaratory of, what would have been true had those sections not been put in the act. The court also quoted with approval the following from Theobald on Principal and Surety: "The obligation of the surety also, in general, becomes extinct, by the extinction of the obligation of the principal debtor. An exception to this rule takes place, whenever the extinction of the obligation of the principal arises from causes, such as bankruptcy and certificate, which originate with the law, and not in the voluntary acts of the creditor." See, also, *Gregg v. Wilson*, 50 Ind. 490; and, to the same effect, 1 Parsons Notes and Bills, p. 249; 1 Parsons Contracts, 29; *Ward v. Johnson*, 13 Mass. 148; Blumenstiel Law and Practice in Bankruptcy, p. 543.

Whatever may have been the purpose or necessity of it, the bankrupt law under which Losey was discharged provided in explicit terms, that no discharge under it should release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as endorser or surety, etc. Bump Law and Practice of Bankruptcy (9th ed.), p. 732, and cases there cited. See, also, *King v. Central Bank*, 6 Ga. 257; *Hall v. Fowler*, 6 Hill, 630; *Camp v. Gifford*, 7 Hill, 169; *Knapp v. Anderson*, 15 N. B. R. 316; *Gregg v. Wilson*, *supra*.

The above mentioned provision of the bankrupt act, as interpreted by the courts, and the general principles of the law, require a holding here that the mortgage in suit was not

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discharged by the discharge in bankruptcy of Robert C. Losey, the principal debtor. *In re Hartel*, 7 N. B. R. 559. See, also, *Catterlin v. Armstrong*, 101 Ind. 258.

Emma J. having mortgaged her property for the debt of Robert C., and thus occupying the position of surety, he was liable to her for whatever might be collected from her property in payment of the debt. In that sense, he was her debtor. She was in a position to have caused the debt, to secure which the mortgage was given, to be proved against the estate of the bankrupt debtor, in order that it might be reduced by whatever dividends were made, if any. Such proof was expressly authorized by the bankrupt law. And because that proof might have been made, the discharge of Robert C. Losey discharged him from all liability to Emma J., by reason of the mortgage. *Blumenstiel Law and Practice in Bankruptcy*, p. 545; *Bump Law and Practice of Bankruptcy*, p. 582; *Mace v. Wells*, 7 How. (U. S.) 272; *Baker v. Vasse*, 1 Cranch C. C. 194; *Hunt v. Taylor*, 4 N. B. R. 683; *Kerr v. Hamilton*, 1 Cranch C. C. 546; *In re Perkins*, 10 N. B. R. 529; *Brandt Suretyship*, section 189.

It results from what we have said, that after the discharge of Losey in bankruptcy, he was neither liable upon the note or otherwise to the payee, nor was he in any way liable to Emma J., who, by reason of the mortgage upon her separate property, occupied the position of surety.

Did, then, the agreement between the bankrupt debtor and the payee and mortgagee, release her and her property as surety?

The rule is universal, that an extension of the time of payment by the creditor, by a binding contract with the principal, and without the knowledge and consent of the surety, will release the surety.

While there is no substantial disagreement between law authors and courts as to the reasons upon which the rule rests, there is some diversity in the statement of those reasons.

It is sometimes said that the reason why an extension of

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the time of payment discharges the surety is, that he would be entitled to the creditor's place by substitution, and the creditor, by agreement with the principal debtor for an extension of the time, without the surety's consent, disables him from suing when he would otherwise be entitled to do so, upon payment of the debt. The case of *Tiernan v. Woodruff*, 5 McLean, 350, was made to rest upon that reason. There, after the maturity of the note, and after the discharge in bankruptcy of the principal debtor, the creditor entered into a sealed agreement with him, without the knowledge or consent of the surety, and for a valuable consideration, that he, the creditor, would not, for the space of two months, commence any proceedings in law or equity, or otherwise, against him, the principal debtor, upon the note. It was held that our bankrupt law extinguished the debt of the bankrupt, even against the surety; and that after the discharge of the principal debtor, the surety had no remedy but to present his demand against the estate of the bankrupt, and that he had no recourse against the bankrupt.

At the close of the opinion it was said: "The time given to Romeyn (the bankrupt), under these circumstances, by no possible means, could have operated to the prejudice of the defendant (the surety). The settled rule of law, therefore, as to the effect of giving time to the principal debtor, does not and can not apply in this case. After the extension complained of, as well as before it, the endorser could have proved the extent of his liability against the bankrupt's estate, and that was the only remedy, which, under the circumstances, the law gave him."

The same reason for the rule has been made prominent in some of our own cases. In some of the cases it has been said, that the agreement must be such as to tie the hands of the principal debtor, and fetter and embarrass the surety. *Wingate v. Wilson*, 53 Ind. 78; *Bucklen v. Huff*, 53 Ind.

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474; *Dickerson v. Board, etc.*, 6 Ind. 128; *Harbert v. Dumont*, 3 Ind. 346.

Citing the case of *Tiernan v. Woodruff*, *supra*, Judge Story, in his work on Promissory Notes, at section 415, in speaking of an extension of the time of payment by the creditor, said: "Or, if being for a valid consideration, it be of such a nature that the maker can by law obtain and entitle himself to the same delay without the consent of the holder (as where the holder had been already discharged from the note in bankruptcy), then the agreement will not operate as a discharge of the endorsers, for the reason that the endorsers can not, under such circumstances, be injured by the delay, or if injured, it is by operation of law, and not dependent upon the act of the holder."

Citing that case, also, Mr. Daniel, in his work on Negotiable Instruments, at section 1313, said: "The reason why extension of time of payment discharges the surety is that he would be entitled to the creditor's place by substitution; and if the creditor, by agreement with the principal debtor, without the surety's assent, disables himself from suing when he would be otherwise entitled to do so, and thus deprives the surety, on paying the debt, from immediate recourse on his principal, the contract is varied to his prejudice—hence he is discharged. But this principle on which sureties are released 'is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties by which they are supposed to be injured.' Therefore, when there is a legal impossibility of injury, the principle does not apply. This was decided to be the case where the maker of a note was a discharged bankrupt; and an agreement between him and the holder for two months' delay, although on a valid consideration, it was held did not discharge the endorser, because the latter could not, by making payment, have recourse against him."

If the rule releasing sureties by an extension of the time of payment rested upon the reason above mentioned, and

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upon none other, it would, perhaps, be the duty of the court to hold here, that the mortgage by Emma J. was not released by the agreement made and endorsed upon the back of the note. But the rule, we think, rests also upon another reason, quite as important and controlling as that already named, and that is, that a valid and binding agreement between the creditor and the principal debtor, without the consent or knowledge of the surety, for an extension of the time of payment, is a modification or alteration of the contract for the performance of which the surety obligated himself, or bound his property.

That reason is recognized, if not asserted, in some of our own cases. The general doctrine, with an exception which we need not here notice, as declared by all of the authorities, is, that in order to release the surety, there must be a new contract between the creditor and principal debtor, fixing the time of payment at a different date from that fixed in the original contract; that the contract for extension must be based upon a new and sufficient consideration, and that the extension must be to a fixed time, so that the contract may embody the necessary elements of certainty; in short, that the contract for extension must embody the necessary elements of a valid and binding contract. See *Wingate v. Wilson*, *supra*; *Chrisman v. Perrin*, 67 Ind. 586; *Hogshead v. Williams*, 55 Ind. 145; *Coman v. State, ex rel.*, 4 Blackf. 241; *Harter v. Moore*, 5 Blackf. 367.

In the case of *Pierce v. Goldsberry*, 31 Ind. 52, it was said, in speaking of the release of sureties by an extension of the time of payment: "It takes from the surety a right which he had under the contract into which he entered, the exercise of which may be essential to his indemnity." And, again: "Sureties are favorites, and will not be held beyond the strict scope of their engagements."

In Daniel on Negotiable Instruments, at section 1312, it is said: "The principle that whatever discharges the principal discharges the surety is of extended application, and it is

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operative whenever anything is done which relaxes the terms of the exact legal contract by which the principal is bound, or in anywise lessens, impairs, or delays the remedies which the creditor may resort to for its assurance or enforcement."

In Story on Promissory Notes, at section 414, is this: "On the other hand, the endorsers, by such an agreement for credit or delay for a prolonged period without their concurrence, would, if the doctrine were not as above stated, be held liable for a period beyond their original contract, and might suffer damage thereby; or, at all events, would be bound by a different contract from that into which they had entered."

In stating the reason of the rule releasing sureties by an extension of the time of payment, Mr. Brandt, in his work on suretyship, at section 296, said: "The reason is, that the surety is bound only by the terms of his written contract, and if those are varied without his consent it is no longer his contract, and he is not bound by it. It therefore follows, that the fact that the principal is insolvent, or that the extension would be a benefit to the surety if he remained bound, makes no difference in the rule. Moreover, the surety has a right when the debt is due, according to the original contract, to pay it, and immediately proceed against the principal for indemnity, and he is deprived of this right by such an extension of the time of payment."

In the case of *Ide v. Churchill*, 14 Ohio St. 372 (383-4), Judge RANNEY said: "Every contract is composed of the material terms and stipulations embraced in it, and, among these, none is more important than the time of performance. It follows, from the principles already stated, that whatever changes any of these material terms and stipulations, so as to destroy the identity of the obligation to which the surety acceded, necessarily discharges him from liability. An engagement to pay money in six months, is not the same as one to pay it in twelve months; and if the creditor, by a valid agreement with the debtor, extends the time of performance

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from the shorter to the longer period, he supersedes the old obligation by the new, and can not enforce payment until the longer period has elapsed. If the surety is sued upon the old agreement, to which alone his undertaking was accessory, he has only to show that *that* has ceased to exist, and no longer binds his principal; and if he is sued upon the substituted agreement, he is entitled, both at law and in equity, to make the short and conclusive answer—*Non hæc in fœdera veni*. But such an agreement between the principal parties is perfectly valid and legal; and until some method can be devised for depriving the principal of the benefits of a valid agreement, or of binding the surety to an agreement to which he never acceded (a work hitherto thought not to be within the powers of either courts or Legislatures), the discharge of the latter must ensue. I am very well aware, that this discharge has been often thought to rest upon the injurious consequences of such arrangements, either real or possible, upon the rights and interests of the surety; and, undoubtedly, in most cases, such would be their necessary tendency. But if it rested upon this ground alone, it would be very difficult, upon equitable principles, to extend the relief beyond the actual injury; while it is universally agreed that they work a total discharge, and extend to cases where no possible injury to the surety, could have ensued.”

In line with the above case, see *Valley National Bank v. Meyers*, 17 N. B. R. 257; *Huffman v. Hulbert*, 13 Wend. 375; *Schnewind v. Hacket*, 54 Ind. 248.

In the case of *Haden v. Brown*, 18 Ala. 641, it was held, as in the Ohio case, *supra*, that the surety was discharged by an extension of the time of payment, because such an extension was a change and alteration of the contract.

A surety is bound only by the strict terms of his engagement.

He assumes the burdens of a contract without sharing its benefits. He has a right to prescribe the exact terms upon which he will enter into an obligation, and insist upon his

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discharge if those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. He may plant himself upon the technical objection, *non hæc in fœdera veni*—this is not my contract. *Markland Mining and Mnfg. Co. v. Kimmel*, 87 Ind. 560; *Weed Sewing Machine Co. v. Winchel*, 107 Ind. 260; *City of Lafayette v. James*, 92 Ind. 240 (47 Am. R. 140).

In the case before us, Emma J. mortgaged her separate property as security for the performance of the contract between her husband, the debtor, and appellant's decedent, the payee, as that contract was evidenced by the note. That contract, as thus evidenced, measured and fixed the manner and extent to which her property was to become liable. *Irwin v. Kilburn*, 104 Ind. 113; *Weed Sewing Machine Co. v. Winchel*, *supra*.

If, then, there has been a modification or alteration of that contract, the mortgage can not be foreclosed. If there has been such a change or modification, the property of Emma J. can not be made liable as security for the original contract, because it no longer exists as originally made, nor as security for the contract as changed, because that would be to make the surety liable beyond the scope of the contract. The note is not the contract, but the evidence of it. In some of the cases above cited, it was expressly held that an agreement between the creditor and principal debtor for an extension of the time of payment, not endorsed upon the note or written instrument, so far as appears, operated as a modification and change of the contract as evidenced by the note or written instrument.

Here, Losey, the principal debtor, and the payee, not only agreed that the time of payment should be extended beyond the time as originally agreed upon and named in the note, but also agreed upon a rate of interest for the future different from that originally agreed upon and named in the note. Not only that, but they endorsed the agreement upon the note. The agreement thus endorsed upon the note operated

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as a modification and change of the original agreement. In other words, after the consummation of the latter agreement, endorsed upon the back of the note, Losey and the payee were no longer bound by the agreement as written upon the face of the note, but by that agreement as modified and changed by the subsequent agreement endorsed upon the back of the note. After that endorsement, their agreement was to be ascertained by an examination of the face of the note and the endorsement. The two writings are to be construed together. Together they constitute the contract between Losey and the payee. To hold otherwise, would be to hold that the latter agreement was and is of no validity whatever. The latter agreement, by its terms, is to pay the note as written, with a change in time and rate of interest. That there was a sufficient consideration for that agreement there can be no doubt. In consideration of the change of time and rate of interest, Losey exchanged a moral obligation only for a legal liability.

In our conclusion that the contract between Losey and the payee is evidenced by the face of the note and the endorsement upon the back of it, we are fully supported by the cases of *Beckner v. Carey*, 44 Ind. 89, and *Harden v. Wolfe*, 2 Ind. 31. It is not easy, if it is possible, to reconcile with those cases the cases of *Huff v. Cole*, 45 Ind. 300, and *Bucklen v. Huff*, 53 Ind. 474, from the opinion in each of which cases, it may be remarked, there was a dissent by one of the judges. There are some differences between the endorsement upon the back of the note in the case before us and the endorsement upon the back of the notes in those cases. The cases may, therefore, be distinguishable. But if there were no differences, we should disapprove those cases and follow the cases of *Beckner v. Carey*, and *Harden v. Wolfe*, *supra*. The contract between Losey and the payee, as evidenced by the face of the note and the endorsement upon the back of it, is not the contract between them as it existed at the time Emma J. executed the mortgage, and to secure

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the performance of which on the part of Losey she mortgaged her separate property. Losey and the payee changed that contract without her consent or knowledge by agreeing upon a different rate of interest and a different time for payment.

The contract to secure which she mortgaged her property can be enforced by no one, and for the contract as changed neither she nor her property is liable. To hold her property liable upon the original contract as evidenced by the note, would be to hold it liable for the default in payment by Losey, three years before he could be in default under the contract as changed; and to hold her property liable upon the changed contract, would be to hold it liable for a contract different in time of payment and rate of interest from that which entered into and formed a part of the contract as evidenced by the mortgage. To hold her property liable upon the original contract, would be to measure the liability of the principal by one standard, and the liability of the surety by another and different standard. But it is said, that because Losey had been discharged in bankruptcy from all his debts, he became a stranger to the note, and that, therefore, the change in the contract agreed to by him can not affect Emma J. or the mortgage given by her.

In answer to that it is sufficient to say, in the first place, that by his discharge Losey did not become, in every sense, a stranger to the note. The discharge released him from all legal liability upon it, and in that sense extinguished the debt; but it did not pay the debt, nor release him from the moral duty of paying it. The moral obligation was a sufficient consideration for his subsequent promise to pay it. *Hockett v. Jones*, 70 Ind. 227; *Shockey v. Mills*, 71 Ind. 288 (36 Am. R. 196); *Meech v. Lamon*, 103 Ind. 515 (53 Am. R. 540); *Wills v. Ross*, 77 Ind. 1 (40 Am. R. 279); *Jenks v. Opp*, 43 Ind. 108.

In the second place, the bankruptcy of Losey did not destroy, change or affect the contract of the surety. Emma J. mort-

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gaged her property to secure the performance of the contract between Losey and the payee as it existed at the time the mortgage was executed. The discharge of Losey from legal liability upon that contract did not, and could not, affect her rights. His discharge from legal liability upon the contract did not destroy or alter it. To hold that it did, would be to hold that it absolutely released the mortgage. The contract between Losey and the payee, so far, at least, as the surety was concerned, remained the same after as before the discharge of Losey.

The only difference was, that by reason of his discharge, he was no longer legally liable upon the contract. He might, however, waive the immunity afforded by his discharge, and pay the debt according to the terms of the note. To secure the performance of the contract according to the terms of the note, and in no other way, the separate property of Emma J. was mortgaged. In order that Losey might again become liable for the payment of the principal sum, the payee consented that the contract might be changed as to the time of payment and the rate of interest. The contract, as evidenced by the face of the note and the endorsement upon the back of it, thus became the contract between Losey and the payee. By the change, the contract as originally executed ceased to exist, both as a legal and moral obligation on the part of Losey. And this is so, whether the new promise be regarded as a revival of the original contract, so far as consistent with it, or whether it be regarded as an entirely new contract.

This suit is really upon the changed contract, because copies of the face of the note and the endorsement upon the back of it are both filed with the complaint as the cause of action.

In any view that may properly be taken of the case, it must be held that the property of Emma J. is no longer liable. As the court below so ruled, the judgment is affirmed, with costs.

Filed May 23, 1887.

Havens v The Home Insurance Company.

No. 12,527.

HAVENS v. THE HOME INSURANCE COMPANY.

INSURANCE.—*Stipulation Against Other Insurance without Written Consent Endorsed on Policy.*—*Forfeiture.*—*Waiver.*—*Estoppel.*—*Pleading.*—In an action to recover on a policy of fire insurance, stipulating that “if the assured shall have or shall hereafter make any other insurance on the property insured, or any part thereof, without the consent of the company hereon written, this policy shall be void,” a complaint, alleging that after the policy was executed an agreement was made that other insurance might be taken, and that a written stipulation to that effect would be inserted in the policy, and also showing that other valid insurance was taken, without any notice to the company or request to insert the stipulation agreed upon, does not show a waiver of the condition against further insurance or estop the company to insist that there has been a breach of such condition, and is bad on demurrer.

SAME.—*Separate Items or Classes of Property Insured.*—*When Contract and Risk Indivisible.*—*Policy Void as to Part Void as to All.*—Where the property covered by a policy of insurance, although consisting of separate items, appears to be so situate as to constitute substantially one risk—as a building and the furniture in it—then, even though separate amounts of insurance be apportioned to each separate item or class of property, if the consideration for the contract and the risk are both indivisible, the contract must be treated as entire; and any breach of a stipulation which renders the policy void as to part affects in the same manner all the other items.

SAME.—*Construction of Policy.*—*Measure of Rights and Obligations.*—While courts incline to such a liberal construction of insurance contracts in favor of the insured as, if possible, to avoid a forfeiture, yet, where parties have, without fraud, mistake or surprise, deliberately entered into a contract, that alone must be looked to as furnishing the measure of their respective rights and obligations.

From the Grant Circuit Court.

J. F. McDowell, H. Brownlee, G. A. Henry, F. M. Finch and J. A. Finch, for appellant.

B. Harrison, W. H. H. Miller and J. B. Elam, for appellee.

MITCHELL, J.—This action was brought by Sarah Havens upon a policy of fire insurance issued to her by the Home Insurance Company of New York, on the 2d day of December, 1883. The insurance was for the period of one year, against loss or damage by fire, to the amount of

111	90
114	5
117	101
119	161
123	174
123	387

111	90
126	415

111	90
163	326

111	90
166	246

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\$2,000, as follows: \$1,500 upon the hotel buildings of the assured in Marion, Indiana, and \$500 on her furniture and household goods therein. Among other stipulations the policy contained the following: "If the assured shall have or shall hereafter make any other insurance on the property insured, or any part thereof, without the consent of the company hereon written, * * * this policy shall be void." There was also the following stipulation in the policy: "The use of general terms or anything less than a distinct, specific agreement, clearly expressed and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein."

The first paragraph of the complaint alleged the execution of the policy, and that the property thereby insured had been destroyed by fire on the 30th day of November, 1884, and that due proof of loss had been made, etc. This paragraph contains the following averment: "The plaintiff further avers that it was expressly agreed and understood that said plaintiff was to have permission to take out an additional insurance of \$1,000 on said building in any other company and at any time she desired, and said company agreed to insert said condition in said policy, which it wholly failed to do. And plaintiff says, that relying upon said promise, and in pursuance of said contract and agreement, she had effected an insurance on said building in the sum of \$1,000, in the Phenix Insurance Company of Brooklyn, New York, * * * as permitted by the express agreement aforesaid."

The court below sustained a demurrer to this paragraph of the complaint.

The appellant's claim is, that the averments above set out in effect show that the insurance company agreed or consented that the assured might procure other insurance on the building, and that, having so consented, it is now estopped to assert that there has been a breach of the condition because the consent of the company was not endorsed on the policy. It is said the agreement amounted to a waiver of

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the condition requiring that the consent of the company to other insurance should be so endorsed.

Insurance policies are prepared by the companies, and contracts of insurance are usually consummated by experts on the one hand, and inexperts on the other. The policy of the law is, therefore, to give them such an interpretation as to prevent a forfeiture whenever upon principles of fair construction such a result is possible.

It is abundantly settled that, notwithstanding conditions in the policy, if at the time the insurance was effected, or afterwards, there were conditions, uses or incidents of the risk which were in conflict with conditions in the policy, and which were known to the insurer, or its agent, whose knowledge is imputable to the company, such conditions, uses, or incidents can not be used to defeat a recovery after a loss has occurred.

Issuing or continuing a policy of insurance, with full knowledge by the company of existing facts, which, according to a condition of the contract, make it voidable, is a waiver of the condition. If it were otherwise, the company would be enabled to perpetrate a fraud upon the assured. *Home Ins. Co. v. Duke*, 84 Ind. 253; *Aetna Ins. Co. v. Shryer*, 85 Ind. 362; *Excelsior, etc., Ass'n v. Riddle*, 91 Ind. 84; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270.

Thus it has been held in a somewhat analogous case, notwithstanding an insurance policy contained printed stipulations almost identical with those above set out, in respect to obtaining other insurance, and in respect to matters which should not be construed as a waiver of any condition or restriction contained in the policy, yet, where an agent whose authority was not shown to have been restricted, inserted in the policy, "\$3,000 other insurance permitted," and who was shown to have had knowledge that other insurance had been obtained, but conveyed to the insured the impression that the written consent of the company was not necessary, that the insurance company was estopped to dispute the valid-

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ity of the additional insurance: *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Hadley v. Insurance Co.*, 55 N. H. 110; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6; *American Ins. Co. v. Luttrell*, 89 Ill. 314.

The tendency of the modern cases is to hold that, if notice be duly given to the company or its agent of additional insurance, or if actual knowledge is brought home that other insurance exists, or has been obtained, and no objection is made, the company will be estopped from insisting on a forfeiture because its consent was not endorsed on the policy. *Wood Fire Ins.*, sections 382, 383; *May Ins.*, sections 369, 370. Having knowledge of the other insurance, the company may manifest its dissent by cancelling its policy; otherwise it will be treated as having assented, and waived compliance with the condition.

This does not deny to insurance companies the right to impose conditions upon which they will assume risks; it does nothing more than to prevent them from taking advantage of conditions, when they have full knowledge of incidents and facts connected with the risk, which are inconsistent with the conditions imposed. It should be observed that the authorities make a distinction in this regard between mutual insurance companies, whose charters require that the consent of the company shall be endorsed on the policy in respect to certain matters, and such companies as regulate the subject-matter under consideration by contract merely.

The principles relied on, although abundantly supported, as controlling in cases somewhat analogous to this, do not reach the necessities of the appellant's case. The case made by the first paragraph of the complaint proceeds upon the theory that another valid policy of insurance had been taken out by the assured in the Phenix Insurance Company of Brooklyn, New York, after the issuance of the policy in suit, and before the destruction of the property by fire. It seeks to avoid the effect of the condition providing for a forfeiture of the policy, by the averment that it was agreed that the

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plaintiff should have permission to take out additional insurance, to the amount of \$1,000, in any company, and at any time she desired to do so, and that the company agreed to insert such a stipulation in the policy, but wholly failed to insert the stipulation as agreed. It does not appear when this agreement was made, whether before or after the execution of the policy. If it was made before, it does not appear that the appellant was induced to accept the policy without full knowledge that the stipulation was absent, nor does the complaint ask for a reformation of the contract. The appellant argues that a fair reading of the contract leads to the conclusion that it was made subsequent to the issuing of the policy. If this be conceded, it in no wise helps the appellant.

If it were admitted that the oral agreement relied on was valid, it effects no substantial modification of the original contract. In any event, permission to take other insurance was to be in writing. Such permission could only have been given by the assured presenting the policy to the company or its agent, and requesting that the stipulation be written in or upon the policy.

After its execution the policy was presumably in the possession of the assured. It does not appear that she ever requested that the stipulation orally agreed upon should be inserted, or that the company or its agent ever had any notice that she had taken, or desired to take, additional insurance. The company was, therefore, guilty of no neglect or wrong.

The position of the appellant comes to this: After the policy was executed, an agreement was made that other insurance might be taken, and that a written stipulation to that effect would be inserted in the policy. Other valid insurance was taken, without any notice to the company or request to insert the stipulation agreed upon, and now it is said the company is estopped to insist upon the condition printed in the policy. This position is not sustainable. As has been seen, insurance companies are estopped to insist upon the enforcement of conditions when they have knowl-

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edge of existing facts which are inconsistent with the conditions imposed. Knowledge of the facts raises a presumption that the company waived the condition, and upon principles of honesty and fair dealing, the law holds it estopped to say to the contrary when such knowledge is shown. Admitting all the facts pleaded to be true, the insurance company has been guilty of no misconduct upon which an estoppel can be predicated. The assured has chosen to stand upon the policy as she received it. With the concession in her complaint that she violated a condition of the policy by taking other insurance, without the consent of, and without notice to the company or its agent, the court could not have done otherwise than sustain the demurrer.

The second paragraph of the complaint waived any right or claim to recover for the destruction of the building, and proceeded only for the loss of the furniture and household goods covered by the policy. To this paragraph the company answered the condition against obtaining other insurance on the property insured, or any part thereof, without the written consent of the company, and alleged that since the issuance of the policy sued on, other valid insurance had been so obtained upon the hotel building. The answer further averred, that the furniture covered by the policy was contained and used in the hotel, and that both formed one risk, and were insured by the same contract and upon one and the same consideration. This was held to be a sufficient answer.

Since part of the insurance was apportioned to the building, and part to the furniture and household goods therein, the question presented is, whether it was competent for the plaintiff to recover that part apportioned to the furniture and household goods, notwithstanding the policy had been voided as to the building. On appellant's behalf, the argument is, that the contract is divisible, and that it does not follow that because it was voided as to the building, it should also be voided in respect to the furniture.

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There is apparently some contrariety of opinion as to the construction of contracts of insurance, and as to the right of the assured to recover in cases somewhat analogous to that under consideration. Where the contract is entire, it seems to be conceded that a breach of condition affects the entire risk, but the authorities are not uniformly agreed as to what constitutes an entire contract, as applied to policies of insurance. So far as we are apprised, the question presented has not been heretofore considered by this court.

Confining the decision to the case in hand, our conclusion, after a careful examination of the authorities, is, that the policy under consideration is to be treated as an entire, indivisible contract in respect to the condition in question.

The purpose of inserting conditions against other insurance in policies manifestly is to protect the company from the hazard of over-insurance, by compelling the assured to continue to be personally interested in the preservation of his property. The condition assumes that the vigilance of the property-owner will be stimulated, and that he will be more watchful to guard against fire in case his relation to the property is such that its destruction by fire will entail a loss rather than a benefit upon him. *Phenix Ins. Co. v. Lamar*, 106 Ind. 513 (55 Am. R. 764). In order, therefore, to give effect to the condition, according to the intent and purpose of the contract, it follows necessarily that where the property covered by one policy, although consisting of separate items, appears to be so situate as to constitute substantially one risk, then, even though separate amounts of insurance be apportioned to each separate item or class of property, if the consideration for the contract, and the risk, are both indivisible, the contract must be treated as entire, nevertheless. To such a policy the principles governing entire and indivisible contracts are applicable, for the reason that the matter which renders the policy void as to part affects the risk of the insurer in respect to the other items in the same manner as it affects those items in re-

Hawes v. The Home Insurance Company.

spect to which the contract is voided. In such a case the only effect of apportioning the amount of the insurance upon the separate items of property specified in the policy is to limit the extent of the company's liability to the sum specified upon each item or class of property insured.

While many well considered cases seem to justify a much broader conclusion than that above stated, in regard to the indivisibility of insurance contracts, we believe that in the main the authorities may be harmonized on the principles above stated, which we regard as the better view of the subject. *Ætna Ins. Co. v. Resh*, 44 Mich. 55 (38 Am. R. 228); *McGowan v. People's M. F. Ins. Co.*, 54 Vt. 211 (41 Am. R. 843); *Gottzman v. Pennsylvania Ins. Co.*, 56 Pa. St. 210; *Schumitsch v. American Ins. Co.*, 48 Wis. 26; *Hinman v. Hartford F. Ins. Co.*, 36 Wis. 159; *Plath v. Minnesota, etc., Ins. Ass'n*, 23 Minn. 479 (23 Am. R. 697); *Bowman v. Franklin F. Ins. Co.*, 40 Md. 620; *Moore v. Virginia, etc., Ins. Co.*, 28 Gratt. 508 (26 Am. R. 373); *Lovejoy v. Augusta M. F. Ins. Co.*, 45 Maine, 472; *Richardson v. Maine Ins. Co.*, 46 Maine, 394; *Gould v. York Co. M. F. Ins. Co.*, 47 Maine, 403; *Barnes v. Union Mutual F. Ins. Co.*, 51 Maine, 110; *Day v. Charter Oak, etc., Ins. Co.*, 51 Maine, 91; *Lee v. Howard F. Ins. Co.*, 3 Gray, 583; *Kimball v. Howard F. Ins. Co.*, 8 Gray, 33; *Freismuth v. Agawam M. F. Ins. Co.*, 10 Cush. 587; *Brown v. People's Mutual Ins. Co.*, 11 Cush. 280; *Garrer v. Hawkeye Ins. Co.*, 69 Iowa, 202; *Wood Fire Ins.*, section 165.

In the following, among other, cases which involved suits upon insurance policies, wherein different properties were insured for separate sums, the contracts were held divisible, and the policy-holder, in each instance, allowed to recover as to some of the separate items, notwithstanding there had been a violation of some condition which avoided the policy as to other items included in the same policy. *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452 (29 Am. R. 184); *Trench v.*

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Chenango Co. M. Ins. Co., 7 Hill, 122; *Koontz v. Hannibal, etc., Ins. Co.*, 42 Mo. 126; *Loehner v. Home M. F. Ins. Co.*, 17 Mo. 247; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164 (5 Am. R. 115).

While we concur in the suggestion that courts incline toward such a liberal construction of insurance contracts in favor of the assured as, if possible, to avoid a forfeiture, yet where parties have, without fraud, mistake or surprise, deliberately entered into a contract, that alone must be looked to as furnishing the measure of their respective rights and obligations. *Phenix Ins. Co. v. Lamar, supra*. Courts can not by construction compel insurance companies to assume obligations which they have fairly guarded against, in order to protect themselves against imposition, so that their solvency may be legitimately preserved, in order to afford indemnity to policy-holders who observe their contracts.

In the case under consideration the risk on the furniture was affected by the same cause that rendered the policy void upon the building. It follows that the policy was avoided *in toto*.

The judgment is affirmed, with costs.

Filed May 24, 1887.

111	98
125	126
111	98
150	415

No. 13,270.

THE STATE v. BRUNER.

CRIMINAL LAW.—*Cruelty to Animals.—Domestic Fowl.—Statute Construed.—*

A domestic fowl is an animal within the meaning of the statute on the subject of cruelty to animals.

SAME.—*Affidavit.—Ownership of Animal.—Immaterial Averment.—Description.*

—*Proof.*—In an affidavit charging cruelty to an animal, an allegation as to the ownership of the animal is unnecessary; but where the ownership is charged, it becomes a matter of description and must be proved as alleged.

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SAME.—*Necessary Averments.—Method of Torture and Effect Produced.*—In such an affidavit, the method of torture or mutilation, as well as the effect produced, ought to be stated.

SAME.—An affidavit which avers substantially that the defendant “did then and there unlawfully and cruelly torture, torment and needlessly mutilate a certain animal, to wit, a goose, the property of some person or persons to the affiant unknown, by then and there unlawfully turpentineing and burning in a cruel and wanton manner the said goose,” sufficiently charges cruelty to an animal within the meaning of the statute.

From the Pike Circuit Court.

F. T. Hord, Attorney General, *J. L. Bretz*, Prosecuting Attorney, and *E. Smith*, for the State.

E. P. Richardson and *A. H. Taylor*, for appellee.

NIBLACK, J.—This was a criminal prosecution against Edward Bruner, the appellee, and one Ralph Smith, based upon an affidavit filed before a justice of the peace of Pike county. Bruner was arrested, and upon a trial the justice found him guilty as charged and adjudged a fine against him. Upon an appeal to the circuit court, the affidavit was quashed and Bruner was discharged. The substantial part of the affidavit is as follows:

“Before me, John M. White, a justice of the peace for said county” (meaning Pike county), “came William Long, who, being duly sworn according to law, deposeth and sayeth that on or about the 21st day of November, in the year 1885, at the county of Pike and State of Indiana, Ralph Smith and Edward Bruner, late of said county, did then and there unlawfully and cruelly torture, torment and needlessly mutilate a certain animal, to wit, a goose, the property of some person or persons to the affiant unknown, by then and there unlawfully turpentineing and burning, in a cruel and wanton manner, the said goose.”

There is a well defined difference between the offence of malicious or mischievous injury to property and that of cruelty to animals. The former constituted an indictable offence at common law, while the latter did not. The former

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has ever been recognized as an indictable offence, as a measure of protection to the owner of property liable to be maliciously or mischievously injured. The latter has in more recent years been made punishable as a scheme for the protection of animals without regard to their ownership. A man may be guilty of cruelty to his own animal, or to an animal without any known owner, or which has, in fact, no owner. When, however, the ownership of the animal is charged, such ownership becomes a matter of description and must be proved as alleged.

The offence plainly intended to be charged in this case is cruelty to an animal, a domestic fowl being an animal within the meaning of the statute.

So much of section 2101, R. S. 1881, which defines the various offences denominated "Cruelty to animals," as is pertinent to this case, is as follows:

"Whoever overdrives, overloads, tortures, torments, deprives of necessary sustenance, or unnecessarily or cruelly beats, or needlessly mutilates or kills any animal, * * * * shall be fined not more than two hundred dollars nor less than five dollars."

The allegation of the affidavit under consideration, that the goose is "the property of some person or persons to the affiant unknown," is the equivalent of an averment that the goose was a domestic fowl. In charging the offence of torturing or mutilating an animal, the method of torture or mutilation, as well as the effect produced, ought to be stated.

The charge that the torture, torment and mutilation were inflicted in this case, by then and there turpentineing and burning the goose in a cruel and wanton manner, is not, perhaps, as full and apt a description of the offence intended to be charged as might have been given, but the fair inference from it is that the appellee and Smith put turpentine on the goose and thereby caused it to be burned in a cruel and wanton manner. As thus construed, we see no objection to the sub-

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stantial sufficiency of the affidavit. The motion to quash the affidavit ought, therefore, to have been overruled.

As to the principles and precedents governing prosecutions for cruelty to animals, see Bishop Statutory Crimes, from section 1100 to section 1122, both inclusive, and authorities cited; also, Wharton Criminal Law, section 1082*d*.

The judgment is reversed, with costs, and the cause is remanded for further proceedings.

Filed May 23, 1887.

No. 13,760.

CARR, AUDITOR, v. THE STATE, EX REL. STEWART.

OFFICE AND OFFICER.—*Bureau of Vital and Sanitary Statistics.*—*Clerk.*—*Appointment of.*—*Secretary of State.*—*State Board of Health.*—The secretary of state has no authority to designate or appoint any one for the performance of clerical duties in the Bureau of Vital and Sanitary Statistics, except upon the requisition of the secretary of the State Board of Health, approved by the president thereof, and addressed to him.

SAME.—*Removal of Clerk.*—A person legally appointed to perform clerical duties in the Bureau of Vital and Sanitary Statistics holds his office or employment at the pleasure of the State Board of Health, and the secretary of state has no authority to remove such clerk.

From the Marion Superior Court.

L. T. Michener, Attorney General, and *J. H. Gillett*, for appellant.

C. Byfield and *L. Howland*, for appellee.

HOWK, J.—In this case, appellee's relatrix, Florence M. Stewart, upon her verified complaint herein, moved the court below for an alternative writ of mandate requiring appellant, Bruce Carr, auditor of state of the State of Indiana, to issue his warrant on the state treasurer, in favor of such relatrix, for the payment of \$100 for clerical duties by her performed during February and March, 1887, in the Bureau of Vital

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and Sanitary Statistics, or show cause why he should not issue such warrant. Appellant appeared voluntarily, and, waiving the issue of an alternative writ of mandate, answered specially in bar of the action. The relatrix's demurrer to such answer was sustained by the court, at special term. To this ruling appellant excepted at the time, and, declining to amend or answer further, the court rendered judgment against him, in favor of relatrix, for a peremptory writ of mandate, with costs, as demanded in her complaint. On appeal, this judgment was in all things affirmed by the general term; and from the judgment of the general term this appeal is now here prosecuted.

Error was assigned by appellant in general term, and is properly presented here, upon the sustaining of relatrix's demurrer to appellant's answer herein.

It is necessary, we think, to a proper understanding of this case and of the questions to be decided therein, that we should first give a summary of the facts stated by relatrix in her verified complaint. She alleged that under and pursuant to the provisions of an act of the General Assembly of this State, entitled "An act establishing a State Board of Health, defining its purposes, powers and duties: providing a system of registration and report of vital and sanitary statistics in connection therewith, and prescribing the duties of certain state, county, township and city officers in relation thereto, and prescribing penalties for violation of certain provisions thereof," approved March 7th, 1881, which act took effect and became a law on the 19th day of September, 1881, the State Board of Health was created and, on November 3d, 1881, was fully organized, and then entered upon, and had since continued in, the discharge of its duties as prescribed by law; that afterwards, on May 9th, 1885, the State Board of Health, in the discharge of its duties, under the above entitled act, needing clerks to perform clerical duties in the "Bureau of Vital and Sanitary Statistics," created in and by section 7 of such act (section 4992, R. S.

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1881), made its requisition upon the then secretary of state for two clerks to perform such clerical duties; that, on the day last named, and upon such requisition, the then secretary of state designated and provided the relatrix herein as one of such clerks to perform such clerical duties for the State Board of Health; that, in pursuance of such requisition and of such action thereon by the then secretary of state, the relatrix on such last named day entered upon the performance of such clerical duties as were required of her by the State Board of Health, at the salary then agreed upon between her and such state board, of \$50 per month; and that since May 9th, 1885, continuously until the filing of her complaint herein, the relatrix had fully performed her clerical duties in such "Bureau of Vital and Sanitary Statistics," to the entire satisfaction and under the orders and directions of the State Board of Health, and that, during all of such time, she performed no work whatever in connection with the duties of the secretary of state, or under his control or direction, except as herein stated; that for all such clerical work so performed by her the relatrix had been regularly paid at the rate of \$50 per month, upon vouchers issued to her by the State Board of Health, directed to the auditor of state, who regularly issued his warrants therefor, from time to time, upon the treasurer of state, except for the months of February and March, 1887; and that for clerical services so performed by her, during such two months, there was due her and unpaid the sum of \$100.

And the relatrix further alleged that, on March 31st, 1887, by order of the State Board of Health, a voucher for such sum of \$100 for the clerical services by her performed as aforesaid, during such months of February and March, 1887, was issued in her favor by the secretary of such state board and approved by its president, and directed to the auditor of state, a copy of which voucher was filed with and made part of her complaint; that afterwards, on April 1st, 1887, the relatrix presented such voucher to appellant, as such au-

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ditor of state, and demanded that he issue to her his warrant upon the treasurer of state for the payment of such sum of \$100; and that appellant, as such auditor, unlawfully and wrongfully refused his warrant to her for the payment of such sum. And relatrix averred that, at the time of her presentation of such voucher to appellant, auditor of state, there was sufficient money in the hands of the treasurer of state provided by law for the payment thereof. Wherefore, etc.

In his answer to the complaint of appellee's relatrix, appellant, Bruce Carr, auditor of state, alleged that on the 9th day of May, 1885, while William R. Myers was secretary of state of the State of Indiana, the State Board of Health made its written requisition, signed by its secretary and approved by its president, upon such secretary of state, of the tenor following, to wit: "We have the honor to request that you appoint two clerks for service in this office, as provided for in section 4992, R. S. 1881;" that thereupon, on the same day, William R. Myers, as such secretary of state, in response to such requisition, notified the secretary of the State Board of Health, in writing, that he appointed "Prof. D. N. Berg and Miss Florence Stewart for such clerkships;" that thereupon, and by virtue of such appointment, Miss Florence M. Stewart, appellee's relatrix, entered upon the discharge of the duties of a clerk in the "Bureau of Vital and Sanitary Statistics," and so continued as such clerk in said bureau, under such appointment as aforesaid of such secretary of state, until, to wit, February 2d, 1887, when Charles F. Griffin, then and since secretary of state for such State of Indiana, as the successor in office of William R. Myers aforesaid, removed appellee's relatrix, Miss Florence M. Stewart, and served on her a written notice of that date, signed by him and addressed to her, of the tenor following, to wit:

"I have the honor to inform you that, in accordance with the powers and duties vested in me, as secretary of state of the State of Indiana, by section 4992, R. S. 1881, I have this

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day appointed James D. Walker to succeed you as clerk of the Bureau of Vital and Sanitary Statistics of said State, said appointment to take effect on and after February 3d, 1887; and that, on and after that day, your services will be no longer required as such clerk."

That, at the same time, Charles F. Griffin, as secretary of state, made of record the following appointment, signed by him and sealed with the seal of the State, to wit:

"I, Charles F. Griffin, secretary of state within and for the State of Indiana, do hereby constitute and appoint James D. Walker to be, and perform the duties of, clerk of the Bureau of Vital and Sanitary Statistics of the State of Indiana, in accordance with the provisions of section 4992, R. S. 1881, of said State, to succeed Miss Florence Stewart as clerk of said board. This appointment shall be and remain in full force and effect on and after February 3d, 1887."

That, on the same day, the secretary of state caused a written notice, signed by him, as such secretary, to be served on the secretary of the State Board of Health, of the following tenor, to wit:

"I have the honor to inform you that, in accordance with the opinion of the attorney general of the State of Indiana, this day filed in my office, and the powers and duties vested in me as secretary of state for the State of Indiana by virtue of section 4992, R. S. 1881, and in accordance with the requisition issued by you, as secretary of the said board, to the Honorable William R. Myers, secretary of state, on the 9th day of May, 1885, calling for two clerks for service in the office of said board, and to perform the clerical duties of the Bureau of Vital and Sanitary Statistics of said State, I have this day removed Miss Florence Stewart, as such clerk, and appointed James D. Walker to succeed her in the performance of such duties; said removal and appointment to take effect on the 3d day of February, 1887."

That on said 3d day of February, 1887, and at divers and sundry times thereafter until this time, said James D. Walker,

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at the office of the State Board of Health, that being the proper office and place, offered his services, and to perform his duties, as clerk of the Bureau of Vital and Sanitary Statistics, under such appointment; but, on each and every such occasion, the secretary of the State Board of Health refused to recognize him as such clerk; and that said Walker had been, and still was, willing and ready to perform his duties as such clerk, under said appointment. And appellant said, that the relatrix, Florence M. Stewart, notwithstanding the premises aforesaid, voluntarily performed the duties of a clerk in said office, at the direction of the secretary of the State Board of Health, from that time on, and was, when appellant answered herein, so performing such duties, in defiance of her said removal and without right or authority so to do; and that, for these reasons, appellant, auditor of state, did refuse to issue a warrant to the relatrix herein, on the treasurer of state, for the payment of her claim for \$100, as alleged in her verified complaint, and for no other reason. Wherefore, etc.

Two questions are presented for our decision by the error assigned by appellant upon the sustaining by the court, at special term, of the demurrer of the relatrix to his special answer to her verified complaint herein, namely: 1st. Was Charles F. Griffin, secretary of state, authorized or empowered by any law of this State to discharge or remove appellee's relatrix, Florence M. Stewart, from the performance of the clerical duties assigned to her in the Bureau of Vital and Sanitary Statistics? 2d. Was such secretary of state authorized and empowered by any law of this State to designate or appoint any one for the performance of clerical duties in such bureau, *except* "upon the requisition of the secretary of the State Board of Health, approved by the president thereof," addressed to such secretary of state? If these two questions must be answered in the negative, as they certainly must, we think, it is clear that no error was committed by the court, at special term, in sustaining the demurrer of relatrix to ap-

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pellant's answer herein, nor by the general term in affirming such ruling.

The State Board of Health of this State, as we have seen, was organized on the 3d day of November, 1881, under the provisions of an act of our General Assembly, approved March 7th, 1881, which took effect and became a law on September 19th, 1881. That act or law contains fifteen sections, and these sections, as they appear in the Revised Statutes of 1881, are sections 4986 to 5000, inclusive.

On behalf of the appellant, the learned attorney general and his associate counsel, as we understand their arguments oral and written, rest his defence to the suit of appellee's *relatrix* upon what they regard as the proper construction of section 7 of such act or law, being section 4992, R. S. 1881. This section reads as follows :

"The State Board of Health shall have supervision of the system of registration of births, deaths, and marriages as herein provided, and they shall make up such forms, and shall, from time to time, recommend such legislation as they may deem necessary for the thorough registration and report of vital and sanitary statistics throughout the State. The secretary of the board shall be superintendent of all such registration : and the clerical duties and safe-keeping of the Bureau of Vital and Sanitary Statistics, thus created, shall be provided for by the secretary of state, upon requisition of the secretary of the State Board of Health, approved by the president thereof."

It is claimed on behalf of appellant, (1) that the clerical duties of the Bureau of Vital and Sanitary Statistics, which, under this section of the statute, must "be provided for by the secretary of state," can only be performed by a clerk ; (2) that such clerk is an officer, whose appointment must be made, under the statute, by the secretary of state ; (3) that, as the duration of the office of such clerk is not provided for in the Constitution, and is not declared by law, under section 2 of article 15 of our State Constitution (section 224, R. S. 1881),

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“such office shall be held during the pleasure of the authority making the appointment;” and (4) that the power of removal from an office is a necessary incident of the power to make an appointment to such office.

It is a clear proposition, which will hardly be controverted, and, certainly, needs no argument to sustain it, that where a law contemplates or provides for the performance of “clerical duties” in any office or bureau, and does not in terms direct the appointment or employment of a clerk to perform such duties, the law impliedly authorizes the appointment or employment of a clerk for the discharge of such duties, and would be so construed. Here, it is declared in the section of the statute under consideration, that “the clerical duties * * * of the Bureau of Vital and Sanitary Statistics * * * shall be provided for by the secretary of state.” Doubtless, this provision of the statute not only authorized the secretary of state, but made it a part of his official duty, to provide for the performance of “the clerical duties * * * of the Bureau of Vital and Sanitary Statistics,” by the appointment or employment of a suitable clerk for that purpose, but only “upon requisition of the secretary of the State Board of Health, approved by the president thereof.”

Whether or not the clerk, so appointed or employed by the secretary of state, upon such requisition approved as aforesaid, is an officer within the meaning of that word as used in the organic and statutory laws of this State, is a question which might, perhaps, admit of some debate, but which we do not find it necessary, in the view we take of this case, to consider or decide. For, whether such clerk be an officer or merely an employee, it is certain that, under the statute, whoever performs “the clerical duties * * * of the Bureau of Vital and Sanitary Statistics,” he must “be provided for” the discharge of such duties, and, therefore, must be appointed or employed, in the sense of selecting, designating or naming him, “by the secretary of state, upon requisition of the secretary of the State Board of Health, ap-

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proved by the president thereof." But after this clerk, whether he be officer or employee, has been selected, designated or named by the secretary of state, he has no further connection with such secretary in any way, is not made subordinate to him, renders no services in his office, and is not dependent upon him for his salary, wages or compensation. After such clerk has been named, appointed or employed, he enters upon the discharge of "the clerical duties * * * of the Bureau of Vital and Sanitary Statistics," of which bureau the statute declares that the secretary of the State Board of Health "shall be superintendent." He must agree with the State Board of Health for his salary, wages or compensation for his services, to which board alone he is authorized by law to look for such compensation. He is subordinate to the State Board of Health, and its secretary and superintendent, and in the performance of the clerical duties of the Bureau of Vital and Sanitary Statistics, he must obey and comply with the orders and directions of such state board and the superintendent of such bureau. It must be held, we think, that such clerk, whether officer or employee, holds his office, place or employment at the pleasure of the State Board of Health, and that it was not within the power of the secretary of state to remove such clerk from such office or employment.

Of course, we recognize the general rule that the power of removal from an office is a necessary incident of the power of appointment to fill such office. It will be seen, however, from the section of the statute above quoted, under which appellant claimed, in his answer herein, that the secretary of state acted in his attempted removal of the relatrix, Florence M. Stewart, from her office or employment as clerk of the Bureau of Vital and Sanitary Statistics, that the power of appointment to such office or employment is not given to the secretary of state absolutely and alone, and that such power of appointment can not be exercised by such secretary of state, *except* "upon requisition of the secretary of

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the State Board of Health, approved by the president thereof.” It is clear, we think, that, without such requisition, the secretary of state would have no power whatever, under such section of the statute, to provide for the performance of “the clerical duties * * * of the Bureau of Vital and Sanitary Statistics,” either by the appointment or employment of a clerk, or in any other manner. Where, therefore, as here, the power of appointment to an office by one person or officer is made to depend upon some precedent or concurrent action of other persons or officers, it can not be said, as it seems to us, that the power of removal from the office is a necessary incident of such power of appointment.

We are of opinion, therefore, that the attempted removal, by the secretary of state, of appellee’s relatrix, Florence M. Stewart, from the performance of “the clerical duties * * * of the Bureau of Vital and Sanitary Statistics,” was not authorized by any law of this State, and was, therefore, void and of no effect.

The second question for decision in this case, hereinbefore stated, may be re-stated as follows: Under the provisions of section 4992, *supra*, above quoted, was the secretary of state authorized and empowered to designate, name or appoint any person for the performance of “the clerical duties * * * of the Bureau of Vital and Sanitary Statistics,” *except* “upon requisition of the secretary of the State Board of Health, approved by the president thereof?” That this question, as here stated, will admit only of an answer in the negative, is too plain, we think, for argument; indeed, this much is virtually admitted by the effort of the secretary of state, as shown in appellant’s answer herein, to base his appointment of James D. Walker, to perform the clerical duties of the Bureau of Vital and Sanitary Statistics, upon an old requisition of the secretary of the State Board of Health, approved by its president, issued more than two years ago, and addressed to Honorable William R. Myers, then secretary of state. It

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was shown, however, by the matters and things set forth in appellant's answer herein, that this old requisition had long since performed its office, and was *functus officio*. The answer of appellant further showed that, by this old requisition, two clerks were then required for service in the office of the State Board of Health, and that the then secretary of state had then supplied and filled such requisition by the appointment of two clerks for such service, of whom appellee's relatrix herein was one.

It was not alleged in appellant's answer, that additional clerical aid was necessary to perform the clerical duties of the Bureau of Vital and Sanitary Statistics, or that the two clerks so appointed, on such old requisition, were not capable and satisfactory to the State Board of Health ; on the contrary, it was alleged by appellee's relatrix, Florence M. Stewart, in her verified complaint herein, and as it was not controverted by appellant, in his answer herein, it was by him admitted, that since May 9th, 1885, continuously until the filing of her complaint in this cause, she had fully performed her clerical duties in the "Bureau of Vital and Sanitary Statistics" to the entire satisfaction, and under the orders and direction, of the State Board of Health.

In conclusion, we are of opinion that the secretary of state is not authorized, *except* "upon requisition of the secretary of the State Board of Health, approved by the president thereof," to name or appoint any person to perform the clerical duties of the Bureau of Vital and Sanitary Statistics ; and that the old requisition issued two years since to William R. Myers, then secretary of state, and filled by him at the time, afforded no authority whatever to the present secretary of state to name or appoint James D. Walker to perform such clerical duties.

The court at special term committed no error in sustaining the demurrer of appellee's relatrix to appellant's answer herein, nor did the general term err in affirming such ruling

of the court at special term, and the judgment rendered thereon.

The judgment is affirmed, with costs.

Filed May 23, 1887.

No. 13,196.

ROBINSON v. RIPPEY ET AL.

STATUTE.—Repeal by Implication.—Gravel Road Acts.—Separate Systems of Procedure.—The gravel road law of March 3, 1877, was not repealed by the act of April 8, 1885, on the same subject; but an intention being manifested to not repeal the former act, two systems for the construction of gravel roads and the making and collection of assessments are created. *Deisme v. Simpson*, 72 Ind. 435, distinguished.

SAME.—Similarity of Provisions of Two Statutes.—Inconvenience.—If an intention to construct two systems for the government of the same subject is manifested, the similarity in the provisions of the two statutes, and the inconvenience worked thereby, are not sufficient to constitute a repeal of the earlier one by implication.

SAME.—Later Act Covering Same Subject-Matter.—When Former Act not Repealed.—The rule that where a later act covers the whole subject-matter of a former one, and contains irreconcilable provisions, a repeal will be implied, fails where an intention not to repeal is manifested and where both acts may stand.

SAME.—Incompleteness of Act.—Construction.—It is not a sufficient objection to an act that it is not in itself complete in every part, for in interpreting and enforcing a statute it is not to be considered alone, but as part of a system of law.

GRAVEL ROAD.—Petition.—Signers to.—Jurisdiction.—Practice.—Where the petition for the construction of a gravel road on its face does not disclose the absence of jurisdictional facts, and no objection is made to it before the board of commissioners, an objection that it is not signed by the requisite number of freeholders is not maintainable on appeal.

SAME.—Jurisdiction not Ousted by Delay.—After jurisdiction has been once acquired by the county commissioners, it is not ousted by mere delay in taking action in the case.

SAME.—Notice.—Appearance.—Where a party appears without making an

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114	368
116	381
117	257
118	160
120	523
121	119
121	213
121	449
122	84
111	112
125	463
111	112
137	358
138	562
111	112
146	221
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148	21
111	112
160	359
160	659
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objection to the sufficiency of the notice, he can not make such objection on appeal.

From the Clinton Circuit Court.

T. F. Davidson, F. M. Dice and J. N. Sims, for appellant.

S. O. Bayless, W. H. Russell, J. V. Kent and J. W. Merritt, for appellees.

ELLIOTT, J.—The controlling question in this case is whether the gravel road law of March 3d, 1877, was repealed by the act of April 8th, 1885. The latter act does not contain any repealing clause, but, on the contrary, expressly asserts an intention not to repeal any former law, for in section 20 it is written: "This act is not intended to repeal any law now in force for the construction of gravel or macadamized roads." Acts of 1885, 162.

There are very material differences in the provisions of the two acts; in many respects they are inconsistent, while in others they are substantially the same. Each act taken in itself constitutes a complete scheme or system for the construction of gravel roads, and for the method of procedure in making and collecting assessments.

The question presented is a very perplexing one, but, after the most careful study we have been able to give it, we have reached the conclusion that it was the intention of the Legislature to create two systems, and not to repeal the former law.

The fact that both of the statutes are directed to the attainment of the same end does not warrant the conclusion that the later repeals the former. Statutes constructing two systems for the government of the same subject may both stand. *Beals v. Hale*, 4 How. 37; *Wood v. United States*, 16 Pet. 342, 363; *Daviess v. Fairbairn*, 3 How. 636; *Raudebaugh v. Shelley*, 6 O. S. 307.

Mr. Bishop thus states the rule: "Two or more separate laws may establish the same right, or provide redress for the

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same wrong. And the person seeking to enforce the right or avenge the wrong may proceed on the law he chooses." Bishop Written Laws, section 163d.

In the legislation upon the subject of drainage we have an example of the creation of two distinct schemes for the attainment of the same end, and these statutes have been sustained and enforced. *Lipes v. Hand*, 104 Ind. 503; *Shaw v. State, etc.*, 97 Ind. 23; *Buchanan v. Rader*, 97 Ind. 605; *Crist v. State, ex rel.*, 97 Ind. 389; *Meranda v. Spurlin*, 100 Ind. 380. There is, therefore, no intrinsic difficulty in maintaining the theory that two systems were created by the Legislature, and the fact that the statutes relate to the same subject, and seek the same end, does not necessarily require it to be held that the later supersedes the earlier.

It does not follow that because two statutes contain similar provisions the earlier is abrogated, for, if the intention to construct two systems is manifested, the similarity in the provisions of the two statutes will not supply a valid reason for declaring the earlier to be repealed by implication. The principle which controls this phase of the question was decided in *Powers v. Shepard*, 48 N. Y. 540, for, as the reporter's head-note states, it was there held that "The re-enactment of certain of the sections of one act, in a subsequent one providing for a different scheme, is not a repeal by implication of those sections in the first act." Our own cases give a substantial recognition to this doctrine. *Cheezem v. State*, 2 Ind. 149; *Martindale v. Martindale*, 10 Ind. 566; *Cordell v. State*, 22 Ind. 1; *Gorley v. Sewell*, 77 Ind. 316 (319).

It may, perhaps, be true that confusion will result from framing two systems for the government of one subject, and that it is an unwise exercise of power; but the wisdom or expediency of a statute is a question for the Legislature, and not for the court. *Eastman v. State*, 109 Ind. 278. The courts can do no more than determine the validity of the statute, and, having adjudged it valid, ascertain and enforce.

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the legislative intention ; they can not, as Judge Cooley says, run a race of expediency with the Legislature. Nor will mere inconvenience, worked by the similarity of two statutes, justify the courts in declaring that the earlier is impliedly repealed by the later. *Waldo v. Bell*, 13 La. Ann. 329 ; *Mitchell v. Duncan*, 7 Fla. 13 ; *Raudebaugh v. Shelley*, *supra* ; *State v. Berry*, 12 Iowa, 58 ; *Wilson v. Shorick*, 21 Iowa, 332.

The addition to an existing system does not necessarily imply its abrogation. In discussing this subject the Supreme Court of the United States said : "It is true that exercise of appellate jurisdiction, under the act of 1789, was less convenient than under the act of 1867, but the provision of a new and more convenient mode of its exercise does not necessarily take away the old ; and that this effect was not intended is indicated by the fact that the authority conferred by the new act is expressly declared to be 'in addition' to the authority conferred by the former acts. Addition is not substitution." *Ex parte Yerger*, 8 Wall. 85 (105).

In the case before us, the Legislature declares that the former act is not repealed, and, in the face of that declaration, we can no more say, than could the court in the case from which we have quoted say of the statute then under discussion, that the later act is a substitute for the earlier.

Repeals by implication are not favored. On this subject the Supreme Court of the United States said : "They are seldom admitted except on the ground of repugnancy ; and never, we think, when the former can stand together with the new act." *Ex parte Yerger*, *supra*.

If the act of 1885 was silent as to the legislative intent, there would even then be some doubt, under the familiar doctrine stated in the case referred to, whether it would not be the duty of the courts to adjudge that the former statute was not repealed ; but, however this may be, in the statute before us there is a broad and express assertion that it was not the intention to repeal any former laws, and we can not regard that assertion as ineffective and meaningless. We

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must adjudge that two systems were created, and, as was done in the case cited, hold that the two statutes may stand together.

In *Tyson v. Postlethwaite*, 13 Ill. 727, it was held that a statute is not repealed by implication where the Legislature had no intention to repeal it, and this statement of the law was approved in *Blain v. Bailey*, 25 Ind. 165. In this instance the legislative declaration of intention is as strong and plain as words could make it, and the courts have no right to disregard the intention so plainly and strongly stated, but they must, if there is any way of doing so, give effect to that intention, and the way in which it can be done is to hold, as we do hold, that two systems were created by the two statutes. If the Legislature should, by plain and imperative words in a later act, repeal an earlier one, it may be that a declaration of an intention not to repeal would be fruitless in the event that there was no possible way of maintaining both of the statutes. Bishop Written Laws, section 41. But there is here a legal way—a way both possible and practicable, and neither unusual nor unreasonable—in which the two statutes may be upheld, and that is, by adjudging that two different systems were created. The case of *Deisner v. Simpson*, 72 Ind. 435, is to be discriminated from the present, for the reason that, in that case, there was no possible way in which to give effect to the formal declaration of intention; while here the way is open, because it can be adjudged, both on principle and authority, that the Legislature has power to create two systems, and that it has done so. In this case there are two distinct systems, each complete in all its parts and capable of practical enforcement; for the frame of the petition, the parties, and the character of the notice, will inform the court of the method of procedure adopted, and apprise it of the statute under which the petitioners have elected to proceed. Possibly, as we have already suggested, confusion and evil may result, although this is by no means a necessary consequence; but if it were,

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the fault is that of the law-makers, and the remedy is in their hands.

We are not unmindful of the general rule that where an act covers the whole subject-matter of the older law and contains provisions that can not be reconciled with it, a repeal will be implied; but, while keeping in mind the rule, we must also keep in mind the principle on which it rests, which is, that the enactment of the new statute covering the whole subject is an expression of an intention to repeal the old law. It is obvious that this reason fails where, as here, there is a positive and unequivocal assertion that there is no intention to repeal the older statute, and where the reason of the rule fails the rule fails. In the face of the express and unequivocal assertion that it is not the intention to repeal any former law, no intention can be implied from the fact that the new statute covers the whole subject. It is difficult to conceive any logical ground upon which an implied intention can be made to rule and override an expressed one, and, certainly, that result can not be permitted where it can, without violating any legal principle or introducing any novel doctrine, be adjudged that the purpose of the new statute was to create a new system. In this case we can not declare that the act of 1885 repeals the former law without utterly disregarding the positive words of the statute and ignoring the familiar rule that repeals by implication are not favored, and that where both statutes may stand neither shall fall.

We can not concur in the view of appellant's counsel, that the act of 1885 is not complete. It is probably true that, detached from all other laws, written and unwritten, it is incomplete in the sense that it can not be practically administered, but it is not to be so detached; on the contrary, it is to be taken as part of one great and uniform system of law, and not as an isolated act, independent of all others. *Humphries v. Davis*, 100 Ind. 274 (284) (50 Am. R. 788); *State v. Boswell*, 104 Ind. 541 (545); *Robertson v. State*, *ex*

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rel., 109 Ind. 79 (87); *Lutz v. City of Crawfordsville*, 109 Ind. 466 (468).

No statute stands entirely alone, for, in interpreting and enforcing it, aid is obtained from the rules of the common law as well as from other statutes.

Mr. Bishop says: "Every statute, as just said, combines and operates with the entire law whereof it becomes a part." Bishop Written Laws, section 7.

It is universally true that every statute in some degree interfuses with the great body of the law of which it forms a part, for, if this were not so, the law would be not merely a mass "of codeless precedents," but a mass of disjointed fragments. Elaborate as our code of civil procedure is, and careful as were the efforts to make it cover the whole field of pleading and practice, resort, nevertheless, is often made to the common law in order to give it just effect. It is upon the great principle we have stated that it has been frequently held that in what are termed special proceedings aid is to be secured from the civil code. *Evans v. Evans*, 105 Ind. 204; *Bass v. Elliott*, 105 Ind. 517; *Burkett v. Holman*, 104 Ind. 6; *Burkett v. Bowen*, 104 Ind. 184; *Powell v. Powell*, 104 Ind. 18; *Robertson v. State, ex rel.*, *supra*.

It is hardly too much to say, that no statute which applies to a general subject, and is to be enforced by judicial proceedings, is to be considered apart from all other laws, for, surely, no one statute of the character indicated can be reasonably deemed the sole repository of the law upon a general subject, governing all its phases and incidents. It would be unreasonable to presume that the Legislature meant to embody the law on such a subject in a single statute. It is, therefore, not a sufficient objection to the act of 1885 that it is not in itself complete and perfect in every part. An examination of the act will, however, disclose that it is far more full in detail and much more specific in its provisions than most statutes.

A repeal of the act of 1877 would lead to very disastrous

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consequences, for it would sweep away assessments made under it, and leave many counties with heavy burdens, and suffer those who have reaped special benefits to escape payment of the tax imposed upon them in consideration of those benefits. This would result because of the settled rule that the repeal of a statute authorizing the levying of taxes or assessments destroys the lien of such taxes and assessments, unless there is a saving clause in the repealing statute; and in the statute now under immediate discussion there is no saving clause. *Marion, etc., G. R. Co. v. Sleeth*, 53 Ind. 35; *Webb v. Brandywine, etc., T. P. Co.*, 55 Ind. 441; *Gorley v. Sewell, supra*. We do not believe the Legislature intended to sweep away all former uncollected assessments, and, for that reason, among others, declared that the former law was not repealed.

We have not examined the question presented by the appellee's contention that the act of 1885 is unconstitutional, for the case may be disposed of without deciding that question. We do not, therefore, decide anything upon that question, but concede, without deciding, that the act of 1885 is constitutional and valid.

It is contended by appellant's counsel that the board of commissioners had no jurisdiction of the subject-matter, for the reason that the petition was not signed by the requisite number of freeholders. But we think that there was such a petition as invoked the jurisdiction of the board, and that, although it may have been defective, still the proceedings are not void. The petition on its face does not reveal the absence of jurisdictional facts, and no objection was made to it before the board, so that we think the point now made is not maintainable. *Stoddard v. Johnson*, 75 Ind. 20; *Coolman v. Fleming*, 82 Ind. 117; *Rutherford v. Davis*, 95 Ind. 245; *Forsythe v. Kreuter*, 100 Ind. 27; *Pickering v. State, etc.*, 106 Ind. 228, and cases cited p. 231; *Lowe v. Ryan*, 94 Ind. 450; *Bradley v. City of Frankfort*, 99 Ind. 421.

It is claimed that the proceedings are invalid because no

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bond was filed with the board as required by the act of 1877; but we find a bond in the transcript sent up from the commissioners' court, and, as that court assumed jurisdiction, the fair presumption is that the bond was properly filed. If, however, we were wrong in this, still the appellant is in no situation to here urge the point, for he made no objection before the commissioners, although he was in court. It is held in some of the cases referred to, and in many others, that a party must make objections in the commissioners' court in order to avail himself of them on appeal. *Green v. Elliott*, 86 Ind. 53; *McKee v. Gould*, 108 Ind. 107; *Osborn v. Sutton*, 108 Ind. 443, and cases cited.

The delay of the commissioners in taking action in the case did not oust their jurisdiction. As jurisdiction was once acquired, it remained until the final disposition of the case, although there may have been intervening errors or irregularities. *Black v. Thomson*, 107 Ind. 162; *McMullen v. State, ex rel.*, 105 Ind. 334; *Hobbs v. Board, etc.*, 103 Ind. 575.

The notice of the meeting of viewers was such as gave the appellant opportunity to be heard, and he, therefore, had his day in court; but if it were true that the notice was not sufficient, still, as he appeared, and, although other objections were urged, made no such objection as that here insisted on, he can not successfully make it now. *Updegraff v. Palmer*, 107 Ind. 181, and cases cited.

Judgment affirmed.

Filed May 23, 1887.

Holland, Guardian, v. Taylor *et al.*

No. 12,829.

HOLLAND, GUARDIAN, v. TAYLOR ET AL.

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LIFE INSURANCE.—Mutual Benefit Associations.—Members Take Notice of By-Laws.—Certificate.—Contract.—Mutual benefit associations are in the nature of mutual insurance companies, and persons who become members thereof are bound to take notice of the by-laws, the latter becoming a part of the contract the same as if written in the certificate.

SAME.—Change of Beneficiary.—Provision of By-Laws.—The beneficiary in a certificate issued by a mutual benefit association, providing for a change of beneficiary, does not, during the life of the assured, have an indefeasible right in the contract or fund to be paid thereunder; but such beneficiary has an interest which can only be defeated by a change effected in the manner provided by the by-laws.

SAME.—Attempted Change of Beneficiary by Will.—Guardian.—Executors.—Control of Fund.—Where the by-laws of a mutual benefit association, not a domestic corporation, provide for the payment of a sum of money to the dependents of a member, and fix definitely the manner of changing the beneficiary, upon the death of the assured, without making a change in the manner specified, the beneficiary named in the certificate becomes the absolute owner of the fund, unaffected by a will attempting to make a different disposition thereof, and, if the beneficiary is a minor under guardianship, the guardian is entitled to the possession and control of the money as against the assured's executors.

From the Marion Circuit Court.

C. Byfield and *L. Howland*, for appellant.

V. Carter, for appellees.

ZOLLARS, C. J.—On the 25th day of August, 1884, the Royal Arcanum, whose principal office and Supreme Council are in Boston, issued to Charles D. Taylor, of Indianapolis, a certificate in these words:

“ROYAL ARCANUM BENEFIT CERTIFICATE.

“This certificate is issued to Charles D. Taylor, a member of Hoosier Council No. 394, Royal Arcanum, located at Indianapolis, Ind., upon evidence received from said council that he is a contributor to the widows and orphans' benefit fund of this order, and upon condition that the statements made by him in his application for membership in said council, and the statements certified by him to the medical examiner,

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both of which are filed in the Supreme Secretary's office, be made a part of the contract; and upon condition that the said member complies in the future with the laws, rules and regulations now governing said council and fund, or that may hereafter be enacted by the Supreme Council to govern said council and fund. The conditions being complied with, the Supreme Council of the Royal Arcanum hereby promises and binds itself to pay, out of its widows and orphans' benefit fund, to Samuel Taylor and Martin V. McGilliard (executors), for the benefit of Anna Laura Taylor (daughter), a sum not exceeding three thousand dollars, in accordance with and under the provisions of the laws governing the said fund, upon satisfactory evidence of the death of said member, and upon the surrender of this certificate: Provided, that the said member is in good standing in this order at the time of his death; and provided, also, that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of this order.

"In witness whereof, the Supreme Council of the Royal Arcanum has hereunto affixed its seal, and caused this certificate to be signed by its Supreme Regent, and attested and recorded by its Supreme Secretary, at Boston, Massachusetts, this 25th day of August, 1884.

"JOHN HASKELL BUTLER, Supreme Regent.

"Attest: W. O. ROBSON, Supreme Secretary."

On the back of the certificate is this form:

"Form of change of beneficiary. Council —, No. —, R. A. To —, 18—. Supreme Secretary S. C. R. A., I hereby surrender and return to the Supreme Council of the Royal Arcanum the written benefit certificate No. —, and direct that a new one be issued to me, payable to —.

"[Seal of sub-council.] [Member's signature.]

"Attest: ———, Secretary."

The Royal Arcanum is governed by a constitution and by-

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laws, sections two and three of the by-laws being as follows :

“Section 2. Each member shall enter upon his application the name or names of the members of his family, or those dependent upon him, to whom he desires his benefits paid, subject to such future disposal of the benefit among his dependents as the member may thereafter direct, and the same shall be entered in the benefit certificate according to said directions,” etc.

“Section 3. A member may, at any time, when in good standing, surrender his benefit certificate, and a new certificate shall thereafter be issued, payable to such beneficiary or beneficiaries dependent upon him as such member may direct, upon the payment of a certificate fee of fifty cents.”

On the 22d day of August, 1884, the day on which, as alleged in appellees' answer, Taylor applied for the above certificate, he made his will. In that will he recited as a fact, that he had in his possession a policy of life insurance for three thousand dollars, issued to him by the Royal Arcanum, and payable to Samuel Taylor and Martin V. McGilliard, his executors, for the benefit of his daughter, Anna Laura Taylor.

In another item of the will the testator directed that, in the event of his personal property being insufficient to pay his debts, the first interest or earnings of the life insurance fund should be applied to that object, the principal to remain intact.

In another item he directed that after his death the insurance fund should be collected by his “said administrators,” and safely invested in real estate loans, and that the interest derived therefrom should be first used in the payment of his debts, and the remainder in the education of his daughter, Anna Laura, according to the best judgment of his “administrators ;” that in the event of his daughter being left motherless, the fund should be used for her benefit in accordance with the judgment of his “administrators ;” and that when

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she should arrive at the age of twenty-one years, the fund, with accumulated interest, should be paid to her.

By another item of the will, and a codicil thereafter made, the testator directed that in the event of the death of his daughter before arriving at the age of twenty-one years, the insurance fund should be given and divided by his administrators, a certain portion to his wife, another portion to his father, another portion to a person neither related to, nor dependent upon, him; and still another portion to the American Baptist Home Mission Society.

In another item appellees, Samuel Taylor and Martin V. McGilliard, were designated as the executors of the will.

The assured and testator, Charles D. Taylor, died in February, 1885.

Subsequently, appellees were appointed and duly qualified as executors of the will, and collected the insurance fund from the Royal Arcanum. Subsequent to the death of the testator, also, appellant was appointed guardian of the person and estate of the daughter, Anna Laura.

In May, 1885, he filed his petition in the Marion Circuit Court, asking therein for an order upon the executors to pay over to him, as such guardian, the fund so collected by them from the Royal Arcanum.

That petition, and the answer thereto by the executors, state the facts substantially as above recited.

The court overruled a demurrer to the answer, and held that the executors were entitled to the fund, to be disposed of as the will directs.

The question for decision is, shall the benefit fund remain in the hands of the executors to be managed, disposed of, and distributed as the will directs, or ought it to be turned over to the guardian as the absolute property of the daughter, Anna Laura Taylor?

Upon a fair construction of the certificate, the by-laws of the order are a part of the contract. Therefore, by accepting the certificate, the member (Taylor) obligated himself to

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comply with the by-laws, and agreed that payment should be made to the executors for the benefit of his daughter, unless the certificate should be surrendered by him, and another issued at his request, in accordance with the laws of the order.

He, and all concerned, would have been bound by the by-laws, even though there had not been such a reference to them in the certificate. Benevolent associations, such as the Royal Arcanum appears to be, are in the nature of mutual insurance companies. Persons who become members of such associations, and accept certificates, are bound to take notice of the by-laws; they enter into and become a part of the contract the same as if they were written out in the certificate. *Bauer v. Samson Lodge, Knights of Pythias*, 102 Ind. 262.

Whatever rights beneficiaries have in life policies, they have by virtue of the contract between the insurance company and the assured. In the case of an ordinary insurance policy, the rights of the beneficiaries in the policy, and to the amount to be paid upon the death of the assured, are vested rights, vesting upon the taking effect of the policy. These rights can not be defeated by the separate, or the combined, acts of the assured and insurance company without the consent of the beneficiary. *Harley v. Heist*, 86 Ind. 196 (44 Am. R. 285), and authorities there cited; *Damron v. Penn Mutual Life Ins. Co.*, 99 Ind. 478, and cases there cited.

As in other cases, so here, whatever right or power Taylor, the assured, had to and over the certificate, was by virtue of the terms of the certificate and the by-laws of the order, which together constituted the contract between him and the order. And whatever rights the beneficiary, Anna Laura, had, or now has, to the fund to be, and in this case paid, upon the death of the assured, her father, she had, and has, by virtue of the same contract.

It should be observed that the Royal Arcanum is not a

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domestic corporation, and hence not affected by section 3848, R. S. 1881. *Presbyterian Mutual Assurance Fund v. Allen*, 106 Ind. 593. If, then, the Royal Arcanum were to be treated as an ordinary life insurance company, and the certificate as an ordinary life policy, it would be clear that Taylor, the assured, had no authority, by will or otherwise, to change the beneficiary, or to in any way affect her rights without her consent.

For many, and, indeed, for most purposes, mutual benefit associations are insurance companies, and the certificates issued by them are policies of life insurance, governed by the rules of law applicable to such policies. There are, however, some essential differences usually existing between the contracts evidenced by such certificates and the ordinary contract of life insurance. *Presbyterian Mutual Assurance Fund v. Allen, supra*; *Elkhart Mutual Aid, etc., Ass'n v. Houghton*, 103 Ind. 286 (53 Am. R. 514); *Bauer v. Samson Lodge, Knights of Pythias, supra*.

The most usual difference is the power, on the part of the assured in mutual benefit associations, to change the beneficiary. But as in either case the rights of the beneficiary are dependent upon and fixed by the contract between the assured and the company or association, there seems to be no reason why the assured should have any greater power to change the beneficiary in one case than in the other, except as that power may be inherent in the nature of the association, or is reserved to him by the constitution, or by the laws of the association, or by the terms of the certificate.

In the case before us, the right and power of the assured, Taylor, to change the beneficiary was reserved to him by the by-laws of the order, and recognized in the certificate. Because of that reservation, the beneficiary, Anna Laura, did not have a right in and to the certificate, and the amount to be paid upon the death of the assured vested in such a sense that it could not be defeated. But it would be saying too much to say that she had no rights. She was the bene-

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ficiary named in the certificate. The executors, so far as shown by the terms of the certificate, had no right at all either in or to the certificate or to the amount to be paid by the association. So far as shown by that certificate, they were mere trustees to collect the amount for the use and benefit of the real beneficiary, Anna Laura. So long as the contract remained as executed, she had the right of a beneficiary, subject to be defeated by a change of beneficiary by the assured.

So long as the certificate remained as executed, the assured had reserved to himself the power to change the beneficiary, and that was the extent of his right in, or power over, the certificate, or the amount agreed to be paid at his death. He had no interest in or to either the certificate or the amount agreed to be paid, that would have gone at his death to his personal representatives. By virtue of the by-laws and the certificate, which, as we have seen, constituted the contract between him and the Royal Arcanum, he had power to change the beneficiary. That same contract fixed the mode and manner in which that change might be made; and we think that, taking the by-laws and certificate together, the mode and manner of changing the beneficiary was fixed as definitely, and was as binding upon the assured, as was the right to make such change binding upon the association and the beneficiary. In other words, under the contract, the assured had a right to change the beneficiary, provided he made the change in the manner provided in the contract. The agreement was that he might change the beneficiary by surrendering the certificate and taking another payable to such beneficiary "dependent upon him" as he might direct.

In that contract Anna Laura, the beneficiary, had such an interest as that she had, and has, the right to insist that in order to cut her out, the change of beneficiary should be made in the manner provided in the contract.

The contract clearly contemplated that the change should be made and perfected by the assured during his lifetime.

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It was not contemplated that he might make such a change by will, of which neither the association nor the beneficiary named in the certificate would have notice before his death, and which would not take effect until after his death.

In many of the cases reported in the books, it appears that such associations had provided in their by-laws and certificates that changes of beneficiaries might be made by the will of the assured.

In the absence of such provisions, the decided weight of authority is, that such changes can not be made by will, and that, to be effectual and binding upon the beneficiary named in the certificate, they must be made in the mode and manner provided in the by-laws and certificate; in other words, that they must be made in the manner and mode provided in the contract.

From the by-laws and certificate before us, it is clearly apparent, also, that the undertaking on the part of the association was not to pay a sum of money for the benefit of the estate of the assured, but for the benefit of members of his family, and those dependent upon him.

Under the second by-law set out above, the member was required to enter upon his application the name or names of the members of his family, or those dependent upon him, to whom he desired his benefits paid, subject to such future disposal of the benefits among his dependents as he might thereafter direct.

By the third by-law the association agreed that, upon a surrender of the certificate by the member, it would issue another to him, payable to such beneficiary or beneficiaries dependent upon him as he might direct. Thus, under the by-laws, the assured might substitute a new beneficiary, provided such beneficiary was a member of his family or dependent upon him, and provided the change of beneficiary was made in the manner prescribed in the by-laws.

Taylor, the assured, did not make a change of beneficiary in the manner prescribed in the by-laws, nor did he name

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as new beneficiaries members of his family only, or those dependent upon him. He disregarded the provisions of the by-laws prescribing the manner of changing, and prescribing what class of persons might be named as beneficiaries, and attempted to make a change by his will. It is true, that he did not attempt to deprive the daughter of all rights as beneficiary, but, treating the certificate as though it belonged absolutely to him, undertook to dispose of the amount to be paid at his death by directing how it should be managed by the executors of his will, and directing that they should use the income from it as assets of his estate for the payment of his debts. And finally, without changing the beneficiary in the manner prescribed in the by-laws, he undertook to deal with the certificate and the amount to be paid upon it at his death as though the daughter had no right to either, except as might be bestowed by his will, and as though they both belonged to him to be disposed of by will as his property. And thus treating them, he undertook to dispose of the fund by giving it to others, neither members of his family nor dependent upon him, provided the daughter did not attain the age of twenty-one years. Without further elaboration upon this branch of the case, our conclusion is, that Anna Laura, having been named in the certificate as the beneficiary, and there having been no change of beneficiary in the manner prescribed in the by-laws of the association, she became the absolute owner of the insurance fund upon the death of her father, unaffected by the will. As fully sustaining our conclusion, we cite the following cases: *Masonic Mutual Benefit Society v. Burkhart*, 110 Ind. 189; *Supreme Lodge, Knights of Pythias, etc., v. Schmidt*, 98 Ind. 374; *Stephenson v. Stephenson*, 64 Iowa, 534; *Hellenberg v. District No. 1, Independent Order of B'nai Brith*, 94 N. Y. 580; *Vollman's Appeal*, 92 Pa. St. 50; *Eastman v. Provident Mutual Relief Ass'n*, 20 Cent. L. J. 266; *Coleman v. Supreme Lodge, Knights of Honor*, 18 Mo. App. 189 (14 Ins. L. J. 635);

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Daniels v. Pratt, 143 Mass. 216; *Supreme Lodge, Knights of Honor, v. Naim*, 22 Cent. L. J. 274; *Gould v. Emerson*, 99 Mass. 154; *Kentucky Masonic Mutual Life Ins. Co. v. Miller*, 13 Bush, 489; *Hogle v. Guardian Life Ins. Co.*, 1 Big. L. & A. Ins. Rep. 597; *Worley v. Northwestern Masonic Aid Ass'n*, 10 Fed. Rep. 227 (11 Ins. L. J. 141, 3 McCrary R. 53); *McClure v. Johnson*, 56 Iowa, 620; *Maryland Mutual Benevolent Society v. Clendinen*, 44 Md. 429 (22 Am. R. 52).

Appellee's counsel cite and rely upon the case of *Splawn v. Chew*, 60 Texas, 532. That case is not in harmony with what we hold here as to the want of power by the assured to change the beneficiary by a will; nor is it in harmony with the cases above cited. It was held in that case, that the by-law providing a mode for changing the beneficiary was directory only; that it was for the benefit of the association alone, and might be waived by it; that the association not objecting, the assured might change the beneficiaries by a will, and that the beneficiaries named in the certificate could not, after the death of the assured, be heard to say that there had been no change of beneficiaries in the manner provided in the by-laws.

As we have already said, in effect, in the case before us, our judgment is that the mode and manner of changing the beneficiary was as obligatory upon the contracting parties and all concerned as was the reservation of the power to the assured to make such change. The beneficiary, Anna Laura, did not have an indefeasible interest in the contract evidenced by the certificate, nor in the amount to be paid upon it upon the death of the assured, but she had an interest in them subject to be defeated by the change of beneficiary in the mode and manner provided by the by-laws which were a part of the contract. *Supreme Lodge, Knights of Pythias, etc., v. Schmidt, supra.*

Taylor, the assured, neither changed, nor attempted to change, the beneficiary in the mode and manner provided in

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the by-laws. He could not accomplish that end, nor affect the ultimate rights of the beneficiary by a will. Upon his death, therefore, Anna Laura became entitled to the amount to be paid upon the certificate, as her absolute property; appellees' executors, having collected from the Royal Arcanum, hold the amount so collected in trust for her, but they have no right to control, manage, and dispose of the fund as directed by the will, because, as to that fund, the will is of no effect.

The fund belonging absolutely to her, her guardian is entitled to it, to control and manage it as the court may direct until she shall have arrived at the years of majority. The court below, therefore, erred in overruling the demurrer to appellee's answer.

In answer to counsel, it is sufficient to say that the fact that Taylor made his will upon the same day that he requested the certificate to be so made as that the amount should be paid to his executors for the benefit of his daughter, can make no difference. The will constituted no part of the contract between him and the Royal Arcanum. That order agreed in the certificate to pay the amount to "Samuel Taylor and Martin V. McGilliard (executors) for the benefit of Anna Laura Taylor (daughter)," but it in no way consented that the beneficiary should be changed, nor that the fund should in any way be turned away from her by the will of the assured; indeed, there is nothing to show that the agents and officers of the order had knowledge that anything of the sort had been attempted by the assured.

The judgment is reversed, at the costs of appellees, and the cause remanded, with instructions to the court below to sustain appellant's demurrer to the answer, and to proceed in accordance with this opinion.

Filed May 24, 1887.

Frank *et al.* v. The Evansville and Indianapolis Railroad Company.

No. 13,372.

FRANK ET AL. v. THE EVANSVILLE AND INDIANAPOLIS
RAILROAD COMPANY.

CANALS.—*Wabash and Erie.*—*Title to Lands Taken by.*—*Easement.*—Where lands were taken, occupied and used under the laws which provided for the construction of the Wabash and Erie Canal, the estate acquired therein was an estate in fee simple, and not a mere easement.

From the Pike Circuit Court.

E. A. Ely and *J. W. Wilson*, for appellants.

A. Iglehart, J. E. Iglehart and *E. Taylor*, for appellee.

HOWK, J.—In this case, the only error complained of here by appellants, the plaintiffs below, is the ruling of the circuit court, sustaining appellee’s demurrer to the plaintiffs’ complaint. This error calls in question the sufficiency of the facts stated in such complaint to constitute a cause of action in plaintiffs’ favor, and against the defendant below. The complaint was substantially as follows:

“Said plaintiffs complain of the defendant and say that heretofore, to wit, in the year 1847, one James Foster was the owner in fee of the land hereinafter described; that after the location and construction of the canal hereinafter described, plaintiffs acquired through conveyance from said James Foster all his interest in said land, including the servient estate hereinafter set out. Said land is described as follows: * * *

“That heretofore, to wit, in the year 1847, while the said James Foster was the owner of said land, the trustees of the Wabash and Erie Canal, under the acts of the General Assembly of the State of Indiana, by their officers, entered upon and constructed across and upon said land a canal, known and designated as the Wabash and Erie Canal, and, in so doing, erected and constructed channels and embankments, water-ways, towpaths and beds for the water therein; and for many years thereafter, to wit, until the committing of the grievances hereinafter named, thereby and by reason

111	133
111	194
113	247
111	132
133	164
111	132
154	224
155	481

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of said canal so constructed and completed, the plaintiffs who were in possession of the land adjoining said canal, being the remainder of said land so owned by the said Foster after the said canal was constructed, were possessed of many valuable privileges in the way of water for stock, conveniences and valuable drainage, and many other convenient and valuable ways of easier approach from any portion of said land to the other portions thereof. The plaintiffs aver that, when said canal was so constructed, said James Foster was compensated for the land so taken by said canal-bed, and in estimating his damages therefor, the rights, privileges and benefits aforesaid were taken into consideration and charged to him as a part of the compensation which he, as the owner of said adjoining land, would derive from the construction of said canal.

“That the defendant is a railroad corporation organized under and by virtue of the general laws of the State of Indiana, and as such corporation has constructed its railroad from the city of Evansville, Indiana, to the city of Terre Haute, over and upon the towpath and embankment so constructed by said Wabash and Erie Canal; that the defendant, said railroad company, has purchased all the right, title, interest and franchises of said board of trustees of the Wabash and Erie Canal in and to the lands aforesaid, on which said canal-bed, channel, towpath and embankment were constructed, and that the same were duly conveyed to the defendant by proper deeds of conveyance in terms purporting to convey said land in fee simple, but without the consent and without first having caused to be assessed to plaintiffs damages therefor, or tendered to them payment of any damage whatever, it has taken possession of and constructed its railroad upon said land as aforesaid and is now operating the same thereon.

“That, in the construction of said railroad, the defendant dug down a portion of said embankment, and destroyed the water-ways, channel and canal-bed, and placed on the tow-

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path of said canal its cross-ties and iron rails and its railroad, and thereby separates the plaintiffs' land, leaving a portion of the plaintiffs' land on either side of the same, obstructing its passage-ways over said canal. That before the construction of said railroad upon said towpath, through said land, said canal had been abandoned, and the plaintiffs had repossessed themselves thereof; and the plaintiffs aver that, upon the abandonment of said canal as a canal, and upon the repossession of the same by the plaintiffs, the title to said towpath and canal-bed, and the fee thereof, which was in abeyance, thereby reverted to the plaintiffs, and, inasmuch as the trustees of said canal had no power to convey said property other than for canal purposes, the defendant took no title from said canal trustees except for canal purposes, and, by reason of the premises, the title to said land so occupied by said railroad company was and is vested in the plaintiffs. That the defendant, through its officers, is operating, and threatening to operate, said railroad over said land without payment of compensation to the plaintiffs, and to their injury in the sum of one hundred dollars, and if the defendant is not enjoined it will continue so to make and operate its railroad.

“That defendant is in possession of said real estate, and has been for three years last past, without the plaintiffs' consent, and claiming title thereto adversely to the plaintiffs, to their damage one hundred dollars. Wherefore, unless the defendant is enjoined by this court, it will waste and destroy the plaintiffs' rights aforesaid, and enjoyment of said land and valuable franchises aforesaid, and render it unsafe for said plaintiffs to enjoy their rights and privileges aforesaid, as the owners of the servient estate in said land, over which the said canal passes, in the same manner and to the same extent that they might, could and would do but for the construction of said railroad, whereby said lands of the plaintiffs will be depreciated in value to the amount of one hundred dollars.

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“Wherefore the plaintiffs pray that the defendant may be enjoined from operating or maintaining said railroad over said lands without having compensation first assessed and tendered to the plaintiffs, and judgment for the possession of said real estate and for one hundred dollars damages, and all proper relief.”

We are of opinion that the court below did not err in sustaining appellee's demurrer to the foregoing complaint. It is shown by the averments of such complaint, that the land in controversy herein is the land in Pike county whereon the canal known as the Wabash and Erie Canal, and its channels, embankments, water-ways, towpaths and beds for the water therein, were constructed under and by the State of Indiana, and its successors, pursuant to certain acts of the General Assembly.

By section 8 of the act of January 19th, 1846, to provide for the funded debt of this State, and for the completion of the Wabash and Erie Canal to Evansville, it was made the duty of the Governor, in the name and under the seal of the State of Indiana, to execute and deliver to the board of trustees of the Wabash and Erie Canal a deed or patent for the bed of such canal and its extensions, from the Ohio State line to Evansville, including its banks, margins, towpaths, etc. In their complaint herein, the plaintiffs alleged, as we have seen, that the defendant railroad company had purchased all the right, title, interest and franchises of the board of trustees of the Wabash and Erie Canal in and to the land in controversy herein, whereon such canal-bed, channel, tow-path and embankment were constructed, and that the same were duly conveyed to such defendant by a proper deed of conveyance, in terms purporting to convey such land in fee simple.

The question is presented by appellants' complaint, and this is the only question for our decision in this case: What estate, title or interest had the board of trustees of the Wabash and Erie Canal in the land in controversy herein prior

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to and at the time of the conveyance thereof by such board to the defendant railroad company, under and by force of the taking thereof and the construction thereon of such canal-bed, channel, towpath and embankment, and the conveyance of the same by and in the name of the State of Indiana to such board of trustees? The same question, substantially, has been considered and decided by us in so many previous cases, to be found in our reports, that it can not now be regarded as an open question in this court. *Water Works Co. v. Burkhardt*, 41 Ind. 364; *Nelson v. Fleming*, 56 Ind. 310; *Cromie v. Board, etc.*, 71 Ind. 208. It was held in the cases cited, where lands had been taken, occupied and used, under the series of laws which provided for the construction of the Wabash and Erie Canal, that the estate taken in such lands was an estate in fee simple, and not a mere easement therein.

In *City of Logansport v. Shirk*, 88 Ind. 563, in speaking of the cases last cited, it was said: "We acquiesce in, rather than approve of, the doctrine of these cases upon the question first stated. This we do, not because the decision of the question, in either of the cases, meets the full approval of our judgments, but for the reason stated in the case last cited (*Cromie v. Board, etc.*, *supra*), that since the decision of the *Burkhardt* case, 41 Ind. 364, 'large rights may have been acquired on the faith of that decision, that would be utterly destroyed by overruling it. The case is one of the class to which the doctrine of *stare decisis* applies with all its force.' " *Rockhill v. Nelson*, 24 Ind. 422; *Goodtitle v. Kibbe*, 9 How. 471, 478; *Schori v. Stephens*, 62 Ind. 441.

Nearly fifteen years have now elapsed since this court decided, in *Water Works Co. v. Burkhardt*, *supra*, where lands had been taken and used, under the laws which provided for the construction of the Wabash and Erie Canal, that the estate so taken in such lands was an estate in fee simple, and not a mere easement therein. Upon the faith of that decision, we may well suppose that, during those years, large

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investments have been made in the lands so taken and used for the construction of the Wabash and Erie Canal, and to that extent the decision in that case must be regarded as a "rule of property." For this reason, we can not now hold that where lands were so taken and used for the construction thereon of such canal, and its channels, embankments, water-ways, towpaths and beds for the water thereof, any less estate was taken or acquired in such lands than an estate in fee simple. *Schori v. Stephens, supra.*

The judgment is affirmed, with costs.

Filed May 24, 1887.

111	137
126	530
111	137
153	510
111	137
150	41

No. 12,472.

NIXON v. BEARD.

PROMISSORY NOTE.—Payment.—Rights of Surety.—A surety in a promissory note has the right to require payment of the note to be enforced when it becomes due; or he may, without compulsion, pay and take it up and immediately institute such proceedings as are necessary for his reimbursement.

SAME.—Agreement of Third Person to Protect Surety.—An agreement "to secure and protect (at any time payment must be made)" another in the settlement of a described promissory note, upon which the latter is surety, binds the promisor to take such measures as are necessary for the protection of the surety, whenever payment of the note, after its maturity, may be required, either by the payee or the surety.

SAME.—Consideration of Contract.—Averment of in Complaint.—Plea of Want of.—Where the consideration of a contract sued on is properly and fully averred in the complaint, a general denial puts the plaintiff to the proof thereof, and it is not error to sustain a demurrer to a paragraph of answer specifically pleading a want of consideration.

PAYMENT.—Giving Negotiable Note for Precedent Debt.—The giving of a negotiable promissory note, governed by the law merchant, for a precedent debt, will operate as a payment and discharge of such debt, unless it be shown that the parties did not intend that the transaction should have that effect.

WITNESS.—Recalling.—Discretion of Trial Court.—Practice.—The recalling

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of a witness, after he has been examined and discharged, rests in the sound discretion of the trial court. Neither party can recall him for further examination as a matter of right. The proper practice is to first obtain leave of the court.

From the Henry Circuit Court.

J. H. Mellett, E. H. Bundy and W. O. Barnard, for appellant.

C. H. Burchenal, J. L. Rupe and J. M. Morris, for appellee.

NIBLACK, J.—Action by William H. Beard against Robert M. Nixon, upon a contract in writing having the nature of a guaranty for the payment of money.

The complaint was in four paragraphs, all of which were held to be sufficient upon demurrer.

The defendant answered in four paragraphs. Demurrers were sustained to the second and fourth paragraphs, and, upon issues joined and a trial, the plaintiff obtained a verdict and judgment on the first paragraph of the complaint. That paragraph of the complaint charged that, on the 4th day of October, 1884, the firm of E. Pleas & Co., as principals, and the plaintiff, as surety, executed a promissory note payable to the First National Bank of New Castle, in this State, ninety days after date, for the sum of \$3,083.00, at eight per cent. interest from date; that, on the 17th day of December, 1884, the said firm of E. Pleas & Co., being in embarrassed and failing circumstances, proposed to convey, assign and mortgage all its property, consisting of chattels only, to the plaintiff and defendant, to secure and indemnify the plaintiff against any loss which he might sustain by reason of his having become surety for said firm as stated, and to secure and indemnify the defendant against all loss which he might otherwise sustain on account of certain debts due him from said firm. Whereupon, at the special instance and request of the defendant, it was agreed between the plaintiff and defendant, and said firm, that said firm should convey, assign and mortgage all of its property to the defendant alone; that, in consideration thereof, the defendant should assume

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and pay the note herein above described, and should secure and save the plaintiff harmless against all loss on account of his suretyship on said note; that thereupon, in pursuance of said agreement, the said firm of E. Pleas & Co. executed and delivered to the defendant a chattel mortgage conveying to him all its property for the purposes stated; that the defendant accepted said mortgage and caused the same to be properly recorded in due time; that afterwards the defendant, by virtue of said mortgage, obtained possession of said mortgaged property and converted the same to his own use; that, in consideration of the execution of said mortgage to him, the defendant promised the plaintiff, by an instrument in writing, a copy of which was therewith filed, to assume and pay said note, and to secure and protect him, the plaintiff, from all loss on account of said note, whenever payment thereof must be made; that, when said note became due and payment thereof was demanded, the defendant failed and refused to pay the same, but suffered the plaintiff to be sued thereon and judgment to be taken against him on said note for the sum of \$3,323.57, with costs of suit, of all which the defendant had due notice; that the plaintiff was compelled to pay, and did pay, said judgment; that said firm of E. Pleas & Co. was at the time of the execution of said mortgage, and has ever since continued to be, wholly insolvent.

The copy of the instrument in writing sued on was as follows:

“NEW CASTLE, IND., December 7th, 1884.

“I hereby agree to secure and protect (at any time payment must be made) W. H. Beard in the settlement of the following described note: Amount \$3,083, dated October 4th, 1884, payable to the First National Bank, New Castle, Ind., ninety days after date, bearing 8 % int. from date, and waiving valuation and appraisement laws, and signed by E. Pleas & Co. and W. H. Beard as security.

“R. M. NIXON.”

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It is insisted that this instrument in writing did not constitute an unconditional promise to pay the note therein described, but amounted only to a contract to pay the same whenever payment should be demanded by the bank, and such payment should become necessary to protect Beard against his liability on account of the failure of E. Pleas & Co. to take up the note, and that hence the paragraph of the complaint, substantially set forth as above, was materially defective for its failure to aver that the bank had demanded payment of the note, and that payment had, in consequence, become necessary when Beard paid the judgment which had been rendered upon the note. We feel constrained, nevertheless, to give the instrument under consideration a more liberal construction. Beard had the right under the law of requiring payment of the note to be enforced when it became due. R. S. 1881, section 1210; *McCoy v. Lockwood*, 71 Ind. 319; *Cochran v. Orr*, 94 Ind. 433.

A surety on a note has also the right, without compulsion, to pay and take up the note whenever it becomes payable, and to immediately institute such proceedings as are necessary for his reimbursement. *Brandt Suretyship*, sections 257, 258; *White v. Miller*, 47 Ind. 385; *Hogshead v. Williams*, 55 Ind. 145.

Delay is often hazardous to the interests of a surety, and hence the law accords to him the right to proceed promptly for his own protection when his liability accrues. Considered, therefore, with reference to the rights of Beard as a surety, we construe the instrument in question as having obligated Nixon to take such measures as were necessary for the former's security and protection whenever the payment of the note, after its maturity, might be required either by the bank or Beard, and, with this construction in view, we regard the demurrer to the first paragraph of the complaint as having been correctly overruled. *Brandt Suretyship*, sections 88, 89.

The second paragraph of the answer set up a want of con-

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sideration for the execution of the written instrument sued on, and error is assigned upon the decision of the court sustaining a demurrer to that paragraph, upon the ground that under our present civil code a want of consideration, when relied on, must be specially pleaded. It is true that, to make a want of consideration a defence to an action on an instrument in writing which imports a consideration, it must be specially pleaded, but that rule does not apply to cases like this in which the consideration is properly and fully averred in the complaint. *Butler v. Edgerton*, 15 Ind. 15. In such a case, the general denial puts the plaintiff to the proof of the consideration substantially as alleged.

Error is also assigned upon the sustaining of a demurrer to the fourth paragraph of the answer. That paragraph averred that the plaintiff, Beard, after the note became due, served a written notice on the bank, requiring it to sue thereon; that he, Beard, employed an attorney to bring suit against himself on the note; that the bank did not demand that payment "must be made;" that, consequently, Beard paid the note voluntarily and without request; that, for these reasons, there was no breach of the contract in suit on Nixon's part.

What we have said touching the sufficiency of the first paragraph of the complaint necessarily leads us to hold that this paragraph was insufficient as a defence.

It came out in the evidence that Beard did not pay money when he took up the note against which Nixon had agreed to secure and protect him, but, instead, executed to the bank a note of his own, negotiable by the law merchant, and the point is made that the execution of such a note was not a payment in that sense which enabled him to proceed against Nixon for his indemnification and reimbursement. But the contrary is the well established law of this State.

It was held in the case of *Alford v. Baker*, 53 Ind. 279, that the giving of a negotiable promissory note, governed by the law merchant, for a precedent debt, will operate as a

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payment and discharge of such precedent debt, unless it be shown that the parties did not intend that the transaction should have that effect; and the doctrine of that case in that respect has been followed and approved in many more recent cases. R. S. 1881, section 5506. A different rule is recognized only as to promissory notes not governed by the law merchant.

One John W. Griffin was called and examined as a witness by the plaintiff, and was then cross-examined by the defendant and discharged. At a later period in the trial he was recalled by the defendant for further cross-examination, and the following question was propounded to him:

“Do you believe in the Christian religion or in the existence of a Supreme Being?”

The plaintiff objected to this question upon the ground that the defendant had no right to recall the witness under the circumstances as stated. The court, without ruling upon the objection thus made, remarked: “I am willing to rule that the witness can not be asked as to his religious belief.” Whereupon the defendant proposed to prove, in answer to the question propounded as above, that the witness did not believe either in the Christian religion or in the existence of a Supreme Being, but the court sustained the objection interposed by the plaintiff to the question, to which an exception was reserved.

It is claimed that, under sections 505 and 506, R. S. 1881, the question propounded to the witness, Griffin, was a proper question as affecting his credibility, and that on that account the court erred in refusing to permit the question to be answered. But our construction of the proceedings in connection with the question so propounded does not support that claim. The recalling of a witness, after he has been examined and discharged, rests in the sound discretion of the court, and, therefore, neither party can recall a witness for further examination as a matter of right. The proper practice is to ask and obtain leave of the court before at-

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tempting to recall a witness. The inference from the record before us is that the defendant below did not first obtain leave to recall Griffin for further cross-examination, and the objection urged to the question addressed to the latter was based upon the implied assumption that, in the absence of such leave, the defendant had no right to address a question of any kind to Griffin as a witness in the cause. It was the objection thus urged which the court finally sustained, and hence the record does not present the question of the right of the party to ask a witness, on his cross-examination, concerning his opinions as to the truth of the Christian religion or the existence of a Supreme Being. What the court intimated on that subject did not, under the circumstances attending what was said at the time, amount to a formal ruling upon it.

The judgment is affirmed, with costs.

Filed May 24, 1887.

No. 12,618.

THE BOARD OF COMMISSIONERS OF FRANKLIN COUNTY
v. BUNTING.

STATUTE.—Construction.—Custom.—A practical construction given to a statute by custom is equivalent to a positive law.

COUNTY COMMISSIONERS.—Authority to Build Jail and Sheriff's Residence.—

The board of commissioners of a county has authority to build a jail and a sheriff's residence in connection therewith.

SAME.—Contract.—Plans and Specifications.—Right to Change.—Compensation.

—**Evidence.**—Under a contract between the board of commissioners and an architect, by which the former, acting officially, has the right to change the plans and specifications for the proposed building, evidence of a request for a change, not specifying the character of the alteration, by one member, acting individually, is not admissible in a suit upon the contract for compensation.

From the Fayette Circuit Court.

111	143
116	308
119	388
119	409
111	143
131	372
111	143
136	571
111	443
141	515
141	527
142	556

111	14
150	23

111	1
158	5

111	1
168	5

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S. E. Urmston, I. Carter, H. Berry and F. Berry, for appellant.

R. Hill, W. H. Martz, B. F. Claypool and J. H. Claypool, for appellee.

ELLIOTT, J.—The principal question in this case is this: Is the board of commissioners of a county invested with authority to build a jail and sheriff's residence? This question appears in various forms, but it is not necessary to discuss in detail the various phases it assumes, for a decision upon the principal question settles all phases of it.

The board of commissioners represents the county, and, by express statute, as well as by necessary implication, is invested with very comprehensive powers. *Board, etc., v. Saunders*, 17 Ind. 437; *Halstead v. Board, etc.*, 56 Ind. 363; *O'Boyle v. Shannon*, 80 Ind. 159; *Hoffman v. Board, etc.*, 96 Ind. 84; *Nixon v. State*, 96 Ind. 111. Some of the cases go so far as to say that it is the county. *State, ex rel., v. Clark*, 4 Ind. 315; *Levy Court v. Coroner*, 2 Wall. 501. Whether the board does or does not constitute the county, may admit of question, but that it is invested with very extensive discretionary powers in the management of county affairs can not be doubted. The discretion vested in it is comprehensive enough to authorize it to build a sheriff's residence in connection with a county jail, for such an act is within the scope of its authority. The statute makes it the duty of the board of commissioners to provide and maintain a county jail, and the law enjoins upon the sheriff as an official duty, that he shall keep the jail. It results as a necessary implication, that he must be provided with the means of discharging this duty, and this involves the authority of providing him with a residence as part of the prison structure, leaving it to the discretion of the board of commissioners to devise and secure the erection of a suitable building. It was not intended that the jail should be composed entirely of prisoners' cells, but it was intended that it should be provided with such

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rooms or apartments as will enable the sheriff, by himself or deputy, to properly and efficiently discharge his duties.

We know judicially that it has always been the custom to make suitable provision for the sheriff's residence, and this custom has given a construction to the law which could not be disregarded, even if there was doubt as to the meaning of the statute. In speaking of a practical construction given to a statute the Supreme Court of Illinois said: "It has always been regarded by the courts as equivalent to a positive law." *Bruce v. Schuyler*, 4 Gilm. 221. By another court the principle was stated, and it was said: "We can not shake a principle which in practice has so long and so extensively prevailed." *Rogers v. Gooden*, 2 Mass. 475. There are many cases which declare and enforce this principle; among them are *Stuart v. Laird*, 1 Cranch, 299; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *Ogden v. Saunders*, 12 Wheat. 213, 290; *Minor v. Happersett*, 21 Wall. 162; *State v. Parkinson*, 5 Nev. 15; *Pike v. Megoun*, 44 Mo. 491; *People v. Board, etc.*, 100 Ill. 495; *State v. French*, 2 Pinney (Wis.) 181.

One of the subordinate questions in the case arises on the ruling of the court refusing to permit the appellant to prove that one of the commissioners, in a conversation with the appellee, after the plans and specifications had been accepted, requested him to make a change in the plans and specifications prepared by him under his contract with the board. In that contract the appellee undertakes, as an architect, to prepare plans and specifications for a jail and sheriff's residence, and it is stipulated, among other things, that "It is hereby agreed by and between the said parties, that the party of the second part shall have said plans and specifications made and drawn in a good and sufficient manner, and present the same to the party of the first part, at their June session, 1881, and that it shall be at the option of the said party of the first part whether the same be received and ac-

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cepted, and that the party of the first part is to have the right to alter and change said plans and specifications in such manner as they may at any time deem it proper and best to make such alteration or change. And that said party of the second part shall alter and change, add to, or take from such plans and specifications as the party of the first part may order. And the party of the second part shall so make, alter and change the same until the said party of the first part shall be satisfied."

It is doubtful whether the right of the board to compel the appellee to make changes was not at an end when the plans and specifications submitted by him were approved and accepted by the board, for the provision is that he was to make such changes until the board "shall be satisfied," and the acceptance would seem to be conclusive evidence that the board was satisfied. Waiving, however, a decision of this point, we adjudge the ruling to be right on other grounds. In our opinion the contract means that the request to make changes shall come from the board acting officially, and not from a member acting individually and in his private capacity. The cases of *McCabe v. Board, etc.*, 46 Ind. 380, and *Halstead v. Board, etc.*, 56 Ind. 363, do not oppose this conclusion, for in those cases there was official action by the board, and there was no contract requiring such action; while here, there is a contract requiring such action, and no such action was taken. In the cases referred to, the irregularity did not consist in a failure to take official action, but in the omission to enter that action of record; while in this case the failure was to take any official action at all. It is quite apparent, therefore, that there is a plain and an important difference between the cases. It is not the question in this case, as it was in those referred to, whether the board can only speak by its record, for the question is: Can the acts of individual members bind a party where official action is required? If it were held that individual members of the board might

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bind a party by individual, and not official, action, then it might often happen that the act of a minority would bind the majority.

There is still another ground on which the ruling may be sustained, and that is this: It was not stated what changes were requested. We think that it was necessary for the appellee, in any event, to show with reasonable certainty that some specific changes were demanded, for it could not be expected that the appellee could proceed without some indication of what was required of him. In order to make the evidence material, it should appear that some definite change or alteration was proposed.

The fourth and fifth instructions are assailed by the appellant, but, as we think, without success. In discussing the principal question in the case, we have disposed of the substantial objections to these instructions. These instructions do not direct the jury, that in the event that the jail should not be built, the appellee might recover the contract price, but the direction is, that he may recover a reasonable compensation for the services rendered. This was certainly as favorable as the appellant had a right to ask. It is, indeed, very doubtful whether the fifth instruction does not give a much more favorable direction than the law warrants, for it asserts that even if the board of commissioners was in fault for not proceeding with the building after the award of the contract, still, the appellee can not recover the compensation fixed by the contract.

Judgment affirmed.

Filed May 24, 1887.

No. 12,366.

POUDER ET AL. v. TATE.

111	149
116	161
118	380
111	148
132	327

EXECUTION.—*Proceedings Supplementary.—Complaint.—Necessary Averments.—Demurrer.—Practice.*—A verified complaint in a proceedings supplementary to execution, which fails to state that the judgment debtor is a resident of the county in which such complaint is filed, or that an execution against his property has been issued to the sheriff of the county in which he resides, is bad, and the defect may be reached by a general demurrer.

From the Marion Superior Court.

W. D. Bynum and *A. T. Beck*, for appellants.

B. Harrison, W. H. H. Miller, J. B. Elam, C. A. Ray, F. Knefler and *J. S. Berryhill*, for appellee.

MITCHELL, J.—A verified complaint in a proceeding supplementary to execution, filed with the clerk of the superior court of Marion county, omitted to state whether or not the judgment debtor, against whom the proceeding was instituted, resided in Marion county, or whether an execution against his property had issued to the sheriff of the county in which he resided. The question is whether, notwithstanding these omissions, the complaint stated facts sufficient to withstand a general demurrer. Section 816, R. S. 1881, reads as follows: "If, after the issuing of an execution against property, the execution plaintiff, or other person in his behalf, shall make and file an affidavit with the clerk of any court of record of any county, to the effect that any judgment debtor, residing in such county, has property (describing it) which he unjustly refuses to apply toward the satisfaction of the judgment, the court, if in session, or the judge or clerk thereof in vacation, shall issue an order requiring the judgment debtor to appear forthwith before the court, * * * or before the judge thereof, * * * to answer concerning the same." In other words, before an order can be made requiring a judgment debtor to appear and answer concerning his property, an affidavit or verified complaint

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must be filed with the clerk of the county in which the debtor resides, showing, among other things, that the latter is a resident of the county in which the proceeding is about to be instituted, and that an execution against his property has been issued to the sheriff of the county in which he resides, or if he do not reside in the State, to the sheriff of the county in which the judgment was rendered. Sections 815, 816, R. S. 1881. Until a verified complaint or affidavit to the foregoing effect is filed, no authority exists for any court or judge to issue an order requiring the judgment debtor to appear.

The complaint under consideration alleges that an execution issued to the sheriff of Marion county upon a judgment rendered in Hamilton county. It does not state, however, that the judgment debtor is a resident of Marion county, nor that an execution against his property had issued to the county in which he resided, nor that he is a non-resident of the State. The case is not distinguishable from *Fowler v. Griffin*, 83 Ind. 297, in which it was held that a similar omission was fatal to the validity of the complaint. In that case the court said: "It is just as necessary that the complaint should show that the execution had issued to the proper county, as that it had issued at all."

The statute enables a judgment creditor to pursue an extraordinary remedy in aid of his execution, but he can only resort to this remedy by a substantial compliance with the law. *Mitchell v. Bray*, 106 Ind. 265; *Earl v. Skiles*, 93 Ind. 178; *Dillman v. Dillman*, 90 Ind. 585.

In support of the ruling of the court, it is contended that the omitted averments relate to or affect the jurisdiction of the court over the person of the judgment debtor. Hence, the argument proceeds, the objection to the complaint could have been reached only by a demurrer assigning as cause that the court had no jurisdiction over the person of the defendant, or by an answer to the jurisdiction as provided by

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section 343, R. S. 1881. As applicable to this proceeding, the view thus urged is not sustainable.

Whenever it appears upon the face of a complaint, which in other respects states a cause of action, that the suit was commenced in the wrong county, or where the fact does not appear in the complaint, but can be shown nevertheless, then the proviso to section 343 applies. In such a case objection must either be taken by demurrer for want of jurisdiction, or by answer. The case before us does not come within that rule. The statute, as has been seen, requires that an affidavit shall be filed setting forth certain facts. In the verified complaint before us, certain facts necessary to be averred and proved, in order that the plaintiff might be entitled to the remedy which he is seeking to avail himself of, were omitted. When a pleading omits an averment which is necessary to establish the plaintiff's right, or entitle him to the remedy or redress demanded, the omission or defect may be reached by a general demurrer. Bliss Code Plead., section 413; 1 Works Pr., section 485.

Section 822, R. S. 1881, provides, in substance, that all proceedings under the act relating to proceedings supplementary to execution, after the order requiring parties to appear, shall be summary, without further pleadings. "But the sufficiency of the order and of the affidavit first filed by the plaintiff may be tested by demurrer or motion to dismiss or strike out the same." It will thus be seen that the statute does not permit pleadings as in ordinary civil actions. *Burkett v. Holman*, 104 Ind. 6, 11. The court tried the case upon this theory, and properly refused the defendants below permission to file answers in bar. There was, therefore, no propriety in holding that objection to the omissions above referred to must have been taken by answer. The demurrer, as it appears in the record, was a general demurrer. It was overruled, and an exception entered of record. There is nothing in the memorandum which the clerk has copied into the record, following the demurrer, or in what purports to

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No. 5740.

WILEY v. THE CORPORATION OF BLUFFTON.

MUNICIPAL CORPORATION.—Special Charter.—Amendment.—Enlargement of Jurisdiction.—Where, prior to November 1, 1851, a municipal corporation was created and organized under a special act, and such act was continued in force by the Constitution of 1851, the General Assembly has power, by special act, to amend the act of incorporation, so as to enlarge the jurisdiction of the municipality territorially or otherwise.

SAME.—Town of Bluffton.—Amendment of Charter by Special Act.—Constitutional Law.—The subject of the act of February 15, 1873, to amend certain enumerated sections of the act of February 12, 1851, to incorporate the town of Bluffton, is not one of the subjects enumerated in section 22, of article 4, of the Constitution of 1851, prohibiting the General Assembly from passing special laws, and is a valid and constitutional exercise of legislative power.

SAME.—Local and General Laws.—Question for Legislature.—It is for the Legislature alone to judge whether a law on any given subject, not enumerated in section 22, of article 4, of the Constitution, can be made applicable and of uniform operation throughout the State, as required by section 23 of the same article.

From the Wells Circuit Court.

R. S. Taylor, for appellant.

J. S. Dailey, L. Mock, S. Claypool, W. A. Ketcham, A. Iglehart and C. L. Wedding, for appellee.

Howk, J.—This cause was submitted to the trial court as an “agreed case,” upon an agreed statement of facts, made out and signed by the parties, under the provisions of section 553, R. S. 1881. Thereupon, the court found for the appellee, the defendant below. Over appellant’s exception to its finding, the trial court adjudged that he take nothing by his suit, and that appellee recover of him its costs in this action expended.

Error is assigned here by appellant, the plaintiff below, upon the finding of the trial court against him upon the agreed statement of facts.

The facts agreed upon by the parties to this suit were substantially as follows:

“1st. The town of Bluffton was incorporated by a special

111	152
118	578
118	433
118	509
111	152
130	439
130	447
111	152
136	543
111	152
137	231
137	325
111	152
142	440
143	315
111	152
144	323
147	487
111	152
151	147
151	149
151	155
111	152
158	437
111	152
164	120
el64	125

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act of the Legislature, approved February 12th, 1851, and has never surrendered its special charter, nor organized under the general law.

"2d. This charter was amended by the act of February 15th, 1873, and, since the passage of that act, the corporation of Bluffton has claimed the benefit of its provisions and has been exercising the powers conferred by it. Both said acts are hereby made part of the record, without being formally set out.

"3d. Before the passage of that act, the corporation boundaries of the town of Bluffton were as indicated by the double pencil lines on the map filed herewith and made part of this agreement. By that act, the boundaries of said town were extended so as to include all of section four, except that part lying northeast of the Wabash river, indicated on said map.

"[Here insert diagram of section 4, showing the Wabash river crossing the northeast corner thereof, (2) the town of Bluffton, as incorporated February 12th, 1851, inclosed by double lines, and (3) the residue of the section, brought within the corporation boundaries by the amendatory act of February 15, 1873.]

"4th. Since the passage of that act, the defendant has been exercising corporate jurisdiction over all said territory, and has levied taxes for corporation purposes on all the lands embraced within the same, basing her claim of right so to do upon said acts.

"5th. The lands described in the complaint are and were the property of the plaintiff, as stated in the complaint, and were not included within the corporate limits of the town of Bluffton, prior to the passage of said act of February 15th, 1873, but were added thereto by said act. The taxes mentioned in said complaint were levied on the lands therein described by the defendant, and were paid by the plaintiff under protest, as stated in the complaint. Said lands have never been laid off into lots, streets or alleys, excepting that,

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since said taxes were levied, the plaintiff laid off twelve lots, with streets, on the northwest corner of the lands described in the complaint (said plat, including streets, is 499 feet by 283 feet, containing one acre, as shown on said map), but are, and always have been, held and used by the plaintiff in a single body, for farming and agricultural purposes, as stated in the complaint, and contain ninety-six acres.

“6th. It is claimed by the plaintiff: 1st. That the Legislature can not confer upon the corporation of Bluffton any new or additional jurisdiction or power by special law, and that so much of the act of February 15th, 1873, as assumes to enlarge the jurisdiction of said corporation, in point of territory or otherwise, is void. 2d. That the lands of the plaintiff, not having been laid out into lots, streets, or alleys, or used for municipal or town purposes, are not legally liable to municipal taxation by, or for the benefit of, the defendant, and that the taxes levied on the same by the defendant, and paid by the plaintiff, are illegal.

“7th. Both these positions are controverted by the defendant.

“If, upon the foregoing facts, the court shall find that the law is with the plaintiff, then judgment shall be rendered for the plaintiff for thirty-five dollars; otherwise judgment shall be for the defendant.”

Two questions are presented for our decision by the record of this cause and the error assigned thereon by appellant, the plaintiff below, namely:

1. Where, prior to November 1st, 1851, a municipal corporation was created and organized under a special act of incorporation, and such act was continued in force by and under the *fourth* clause of the schedule or ordinance annexed to, and constituting a part of, our State Constitution of 1851, had or has the General Assembly power or authority, by special act, to amend such act of incorporation, in such manner as to enlarge the jurisdiction, territorially or otherwise, of such municipal corporation?

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2. Conceding that the General Assembly has such power or authority, is the act of February 15th, 1873, to amend certain enumerated sections of the act of February 12th, 1851, "to incorporate the town of Bluffton," a valid and constitutional exercise of such power or authority?

We will consider and decide these two questions in the order of their statement.

1. In section 13, of article 11, of our State Constitution of 1851, it is provided as follows: "Corporations, other than banking, shall not be created by special act, but may be formed under general laws." Section 212, R. S. 1881. By this constitutional provision, construed in connection with the other provisions of the Constitution of 1851, it was certainly intended that, on and after November 1st, 1851, the General Assembly, the law-making power of this State, should have no power or authority, by special act, to create, to originate or to bring into existence, as a new corporate entity, a municipal corporation where none had previously existed; but, on and after the day named, the legislative power or authority of the General Assembly was limited, by the constitutional provision quoted, to the enactment of a general law, under which such new corporate entity might be formed. In the schedule annexed to, and constituting a part of, our State Constitution of 1851, "That no inconvenience may arise from the change in the government, it is hereby ordained as follows: * * * *Fourth.* All acts of incorporation for municipal purposes shall continue in force under this Constitution until such time as the General Assembly shall, in its discretion, modify or repeal the same." Section 235, R. S. 1881.

It is not controverted by appellant's counsel, as we understand his briefs of this cause, that the act of February 12th, 1851, entitled "An act to incorporate the town of Bluffton, in Wells county, Indiana," was continued in full force under and by virtue of the provisions of the *fourth* clause of the schedule annexed to and forming a part of our State Con-

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stitution of 1851. His learned counsel claims, however, with much earnestness and ability, that, while such act of incorporation, or special charter of the town of Bluffton, was so continued in force, no power or authority was vested in the General Assembly, by any provision of the State Constitution of 1851, to amend by special act such special charter in such manner as to enlarge, territorially or otherwise, the jurisdiction of the corporate authorities of such town of Bluffton. While, by the terms of such *fourth* clause of the schedule, discretionary power was clearly vested in the General Assembly to "modify or repeal" such act of incorporation, or special charter, of the town of Bluffton, so continued in force, it is forcibly contended by appellant's counsel, with much research and learning, that this power to "modify" did not authorize the General Assembly to amend, by special act, such special charter or act of incorporation, so as to enlarge the jurisdiction, territorially or otherwise, of the corporate authorities of the town of Bluffton.

It is not necessary, however, that we should pursue the arguments of appellant's counsel, or that we should examine and consider at any greater length the first of the two questions heretofore stated in this opinion. During the last twenty years, substantially the same question has been presented here for decision in a number of cases; and it has been uniformly held, that, under the *fourth* clause, above quoted, of the schedule or ordinance which is annexed to, and constitutes an integral part of, our State Constitution of 1851, the General Assembly is expressly authorized, by and under the discretionary power to "modify," to amend an act of incorporation, or special charter, for municipal purposes, continued in force by such *fourth* clause, even where the effect of the amendment would be to enlarge the jurisdiction, territorially or otherwise, of the corporate authorities of the municipality. *Longworth v. Common Council of the City of Evansville*, 32 Ind. 322; *City of Evansville v. Bayard*, 39

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Ind. 450; *Chamberlain v. City of Evansville*, 77 Ind. 542; *Eichels v. Evansville Street R. W. Co.*, 78 Ind. 261 (41 Am. R. 561); *Warren v. City of Evansville*, 106 Ind. 104; *Corporation of Bluffton v. Studabaker*, 106 Ind. 129; *City of Evansville v. Summers*, 108 Ind. 189.

In the case last cited, after quoting the *fourth* clause of the schedule or ordinance which is annexed to, and forms a part of, our State Constitution of 1851, the court said: "That the special charter, thus granted and retained, may be amended by special or general acts, is not here questioned, and is well settled." Upon these authorities, it must be held, we think, in the case in hand, that, under such *fourth* clause of the schedule annexed to the State Constitution of 1851, the General Assembly had the power or authority to amend the act of incorporation of February 12th, 1851, or special charter of the town of Bluffton, by special act, even where the effect of such amendatory act was to enlarge the jurisdiction, territorially or otherwise, of such municipal corporation. It is certain that such an amendatory act does not fall within any of the cases enumerated in section 22, of article 4, of the State Constitution of 1851 (section 118, R. S. 1881), wherein it is declared that "The General Assembly shall not pass local or special laws." Whether or not the subject of such amendatory act was one where a general law could have been made applicable, "and of uniform operation throughout the State," was a question for the decision of the General Assembly, and not of the courts. Section 119, R. S. 1881. Thus, in *Gentile v. State*, 29 Ind. 409, it was held by this court that it is for the Legislature alone to judge whether a law on any given subject, not enumerated in section 22 of article 4, can be made applicable "and of uniform operation throughout the State," as required by section 23 of the same article, of the State Constitution of 1851. Upon this point, the case cited has been approved and followed in a number of our decided cases. *Longworth v. Common Council, etc., supra*; *State, ex rel., v. Tucker*, 46

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Ind. 355; *Vickery v. Chase*, 50 Ind. 461; *Kelly v. State, ex rel.*, 92 Ind. 236; *Johnson v. Board, etc.*, 107 Ind. 15.

The subject of the act of February 15th, 1873, amending certain sections of the act of incorporation, or special charter, of the town of Bluffton, is not one of the subjects enumerated in section 22, of article 4, of the State Constitution of 1851, wherein the General Assembly were prohibited from passing special laws. By their enactment of such special amendatory act, the General Assembly virtually decided that the subject of such act was one to which a general law, "of uniform operation throughout the State," could not be made applicable; and such decision is final and conclusive.

2. This brings us to the consideration of the second question, hereinbefore stated, namely: Conceding the power or authority of the General Assembly to amend, by special act, the above entitled act of incorporation of February 12th, 1851, or special charter of the town of Bluffton, is the amendatory act of February 15th, 1873, a valid and constitutional exercise of such power or authority? We know of no objections to the validity or constitutionality of such amendatory act, other than those we have already considered, and have found to be insufficient. When it is conceded that the subject of such act is a proper subject of legislation, it is not within the province of the courts to criticise the impolicy or seeming injustice of the provisions of the statute, or to relieve a party aggrieved thereby from the operation thereof. For such grievances the General Assembly alone can furnish adequate relief.

We are of opinion that the court did not err in finding for appellee, the defendant below, upon the agreed statement of facts herein.

The judgment is affirmed, with costs.

Filed May 25, 1887.

Harter v. Eltzroth.

No. 12,194.

HARTER v. ELTZROTH.

PRACTICE.—Appeal.—Showing of Error.—Reversal of Judgment.—Unless the record affirmatively shows the existence of error, and that it was, or probably was, prejudicial to the party complaining, the judgment will not be reversed.

SAME.—Evidence.—Examination of Witness.—Objection to Question.—Statement as to Answer Expected.—To constitute available error in ruling out a question propounded to a witness, the interrogating party must announce to the court what he expects to elicit in answer to the question. A general statement that he expects to follow up the question by showing a certain fact, but not announcing that he expects to make the proof by the witness interrogated, is not a compliance with the rule.

CORPORATION.—Sale of Stock.—Implied Warranty.—There is no implied warranty on the part of the vendor of certificates of stock, that the corporation issuing them is a corporation *de jure*. If the corporation is a *de facto* one, that is sufficient to relieve the vendor from any implied warranty as to the existence of the corporation.

From the Montgomery Circuit Court.

G. W. Paul and *J. E. Humphries*, for appellant.

E. C. Snyder, *G. D. Hurley*, *B. Crane* and *W. H. Thompson*, for appellee.

ZOLLARS, C. J.—Appellant purchased from appellee certificates of stock in the Crawfordsville and Shannondale Consolidated Turnpike Company. He claims that the stock is not worth what he gave for it, and that, therefore, he suffered loss by reason of the purchase. He further claims, that appellee is liable to him because of warranties, express and implied, and because of fraudulent representations in the sale and transfer of the stock to him, in relation to the value of the stock, in relation to the stock having been paid up, and in relation to the debts, and the legal incorporation of the company.

It is urged that the court below erred in excluding evidence which would have proved, or tended to prove, the existence and violation of the alleged warranties, and the existence of the alleged fraud on the part of appellee.

111	159
113	239
116	444
119	439
111	159
129	471
111	159
141	539
141	700
111	159
149	39

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It is contended on the part of appellee, that the record does not present the questions discussed by counsel in such a way as to justify this court in overthrowing the judgment in his favor. That contention can not be disregarded.

It has long been the settled rule, that this court will not reverse a judgment of the trial court unless the record affirmatively shows the existence of the errors urged by the complaining party, and, also, that those errors were, or probably were, prejudicial to the party against whom they were committed. *Binns v. State*, 66 Ind. 428; *Cline v. Lindsey*, 110 Ind. 337, and cases there cited; *McKinsey v. McKee*, 109 Ind. 209, and cases there cited.

When appellant was upon the stand as a witness in his own behalf, he was asked by his counsel to state what, if anything, appellee said at the time of the transfer of the stock about its being paid up. The court sustained an objection to the question, and appellant excepted, but it was in no way stated to the court what fact, or facts, appellant expected to prove by an answer to the question. The trial court was not informed of what the answer to the question might be, nor had it any means of knowing. Neither has this court any means of knowing what the answer might have been.

This court, clearly, can not assume, or presume, that the answer would have been such as to establish any fact favorable or beneficial to appellant. For aught that was made to appear below, and for aught that is shown by the record here, it might as well be assumed that the answer, if allowed, would have been detrimental to appellant. It is sufficient here, that the record does not affirmatively show that appellant was injured by the ruling of the court below in sustaining the objection to the question, nor that there was error in that ruling. *Mitchell v. Chambers*, 55 Ind. 289; *Wilcox v. Majors*, 88 Ind. 203; *Louisville, etc., R. W. Co. v. Smith*, 91 Ind. 119; *Elliott v. Russell*, 92 Ind. 526 (530).

What we have said in reference to the ruling of the court

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below upon the above question applies to the rulings upon all the other questions propounded to appellant.

A question as to the value of the stock at the time of the transfer to appellant was propounded to the witness, Durham. Upon objection being made to the question, appellant announced to the court that he expected to follow it up by showing that appellee represented the stock to be of some value. Upon that announcement, the court ruled that appellee would have to introduce that evidence first. There was no available error in that ruling, if for no other reason, for the reason that appellant neither excepted to the ruling nor assigned it as a cause for a new trial. 1 Works Pr., section 929; *Frybarger v. Andre*, 106 Ind. 337; *Hampson v. Fall*, 64 Ind. 382; *North Western Mutual Life Ins. Co. v. Heimann*, 93 Ind. 24.

The general statement by appellant, that he expected to follow up the question to Durham by showing that appellee represented the stock to be of some value, can not be extended to, and so connected with, the questions propounded to appellant, as a witness, as to fill the demands of the rule which requires that, in order to constitute available error in ruling out a question, the interrogating party must announce to the court what he expects to elicit from the witness in answer to the question. The offer must be to make the proof by the same witness to whom the question is propounded.

Appellant further contends that the court below erred in overruling his demurrer to the second paragraph of appellee's answer. There is no available error in that ruling.

In the first place, that paragraph of answer negatives all of the allegations of warranty and fraud set up in appellant's complaint.

Appellee did not, by the sale and transfer of the certificates of stock, impliedly warrant that the turnpike company had been incorporated in strict compliance with the statute authorizing such corporations. There was a statute author-

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izing such corporations, and the answer shows that, at the time the certificates of stock were issued, the turnpike company was, at least, a *de facto* corporation. That was entirely sufficient to exonerate appellee from liability on account of any implied warranty there may have been in the sale and transfer of the certificates of stock, as to the existence of the corporation.

In a case involving municipal bonds issued without statutory authority, and in speaking of the implied warranty in the sale of such securities, the Supreme Court of the United States, in the case of *Otis v. Cullum*, 92 U. S. 447, said: "The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty." A less liberal rule, clearly, can not be applied to the sale and transfer of certificates of stock.

It was held in the case of *People's Bank v. Kurtz*, 99 Pa. St. 344 (44 Am. R. 112), as stated in the syllabus, that the vendor of a share of stock impliedly warrants that the same is issued by the duly constituted officers of the company; and that he does not impliedly warrant that such a share has not been fraudulently issued by the officers in excess of the charter limit.

We have been unable to find any authority holding that the vendor of shares of stock impliedly warrants that the corporation, by which the certificates of stock were issued, was a corporation *de jure*.

The record presents no error for which the judgment should be reversed.

Judgment affirmed, at appellant's costs.

Filed May 24, 1887.

Joyce et al. v. Hamilton et al.

No. 12,262.

JOYCE ET AL. v. HAMILTON ET AL.

ADVANCEMENT.—*What Constitutes.*—*Real Estate.*—To constitute an advancement the ancestor must, in his lifetime, divest himself of all interest in the property set apart to the heir.

SAME.—*Possession of Property by Heir.*—*Improvements.*—*Intention.*—*Different Disposition by Ancestor.*—Where, by the direction and with the consent of the owner, his daughter and her husband enter into the possession of a tract of land, and with his knowledge make lasting and valuable improvements, it being the father's intention that they shall reside thereon during his life, receive the proceeds, keep up repairs and pay taxes, and at his death the daughter to take a life-estate, with remainder to her children, there is no advancement, and the ancestor may make a different disposition from that intended.

SAME.—*Evidence.*—*Declarations of Ancestor as to Intention.*—In an action by the daughter to quiet title, evidence of declarations made by her father, previous to the time she took possession, showing an intention different from that asserted in the plaintiff's behalf, is admissible.

From the Rush Circuit Court.

G. H. Puntenney, A. B. Irvin, J. Q. Thomas and J. J. Spann, for appellants.

B. L. Smith, C. Cambern and T. J. Newkirk, for appellees.

NIBLACK, J.—Complaint by Mary B. Joyce and John F. Joyce, her husband, against Martha J. Hamilton and Rebecca Hamilton, to quiet title to a tract of land in Rush county.

The complaint was in four paragraphs, but the first and second were withdrawn before the cause was tried. The third paragraph averred that the plaintiff Mary B. Joyce was the daughter of one Francis M. Hamilton, who had died testate; that in May, 1880, the decedent was the owner of the land in controversy, particularly describing it, and that he then gave it to her, the said Mary B. Joyce, as an advancement out of his estate; that soon afterwards the plaintiffs, with the knowledge and consent of the decedent, went into the possession of said tract of land, and had ever since continued in such possession, having in the mean time paid the taxes and made valuable and lasting improvements on

111	163
126	256
111	163
132	357
111	163
151	76

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the same ; that afterwards, on the 21st day of March, 1883, the decedent, being still in life, conveyed said tract of land, in consideration of natural love and affection, to the defendants; that the defendant Martha J. Hamilton was then the decedent's wife, being his second wife; that the defendant Rebecca Hamilton was the mother of the decedent; that such conveyance was a cloud upon the title of the plaintiff Mary B. Joyce, which, it was demanded, should be quieted.

The fourth paragraph was substantially similar to the third, except that it averred that the land was advanced to both of the plaintiffs.

The court, after having heard the evidence, made a special finding of the facts, which was to the effect that the said Mary B. Joyce was the daughter of the said Francis M. Hamilton, who died testate, on the 8th day of June, 1883; that the said Francis M. Hamilton was, for some time before his death, the owner of a large amount of real estate in said county of Rush, of which the tract of land described in the complaint constituted a part; that by the direction and with the consent of the said Francis M. Hamilton, the said Mary B. Joyce, with her husband, the said John F. Joyce, had, on or about the 1st day of March, 1881, entered into the possession of said tract of land, and had ever since continued in the possession thereof; that the plaintiffs had previously, that is to say, during the fall of 1880, sowed wheat on said tract of land; that at the time the plaintiffs moved onto the land, it was the intention of the said Francis M. Hamilton that the said Mary B. Joyce should, with her husband, reside thereon as long as he, the said Francis M. Hamilton, might live, and that at his death she should take a life-estate in the land, and that at her death the same should become the property of her children begotten in wedlock, and that should she die without leaving such children, the land should go to her heirs of the same blood; that during the lifetime of the said Francis M. Hamilton, she, the said Mary, should keep the said land in repair and pay the taxes thereon, and

receive the proceeds thereof; that while the said Mary B. Joyce and her husband were in possession of the land, during the lifetime of the said Francis M. Hamilton, and with his knowledge, they made lasting and valuable improvements on the same, by repairing and adding to the dwelling-house, building fence, blowing out stumps and planting fruit trees, the value of such improvements ranging from \$250 to \$300; that, on the 21st day of March, 1883, the said Francis M. Hamilton, by his warranty deed, conveyed the tract of land in dispute to the defendants, one of them being his wife and the other his mother, as alleged in the complaint; that said conveyance was made without any valuable consideration and without the knowledge or consent of the plaintiffs.

From the facts thus found the court came to the conclusion that the plaintiffs were not entitled to the relief demanded, and over exceptions reserved and a motion for a new trial, judgment was accordingly awarded in favor of the defendants.

The facts as thus found by the court did not support the averment that Francis M. Hamilton had, in his lifetime, advanced the land in controversy to Mrs. Joyce. Nor did they establish a binding obligation on him either to convey or devise the land to her. There is an essential difference between an expressed intention to do a given thing and an absolute undertaking to do it. *Shockey v. Mills*, 71 Ind. 288 (36 Am. R. 196); *Meech v. Lamon*, 103 Ind. 515 (53 Am. R. 540).

The fair inference from the facts in question is, that, after the plaintiff went into the possession of the land, the ancestor, Hamilton, changed his mind as to the ultimate disposition he wished to make of the property, and that he accordingly made a disposition of it different from that which he intended when he permitted the plaintiff to take possession. There is nothing in the special finding justifying the conclusion that he, the ancestor, ever parted either with the title or the control of the property until he conveyed it to

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the defendants. To constitute an advancement, the ancestor must, in his lifetime, divest himself of all interest in the property set apart to the heir. *Crosby v. Covington*, 24 Miss. 619; *Smith v. Smith*, 5 Vesey, 721; *Williams Exec.* 1501.

In the introduction of their evidence, the plaintiffs did not confine themselves to any definite or distinct contract with Francis M. Hamilton as to the terms and conditions upon which they entered upon and occupied the land in suit, but relied on proof of various conversations, in the nature of admissions, which the said Hamilton had with different persons, the first conversation referred to occurring in the spring of 1880, and the last some time after the plaintiffs obtained possession of the land, which was in the spring of 1881, as stated.

One Newkirk was called as a witness by the defendants, and, over the objection of the plaintiffs, testified to a conversation which he claimed to have had with Hamilton in December, 1880, or January, 1881, in which the latter stated his intentions in regard to the land in litigation, and the object he had in view in permitting the plaintiffs to take charge of it, differently, in some essential respects, from his declarations on the same subject as sworn to by some of the witnesses for the plaintiffs. The ground of objection to Newkirk's testimony was, that, as there was evidence tending to show that some kind of an agreement concerning the land had been reached as early as the month of May previous, and as the plaintiffs had before that time sowed wheat on the land, the admissions and declarations of Hamilton, made at so late a period, were inadmissible to impair the claim of the plaintiffs to an absolute title to the land. But, as has been seen, the time referred to by Newkirk was within the period covered by the witnesses for the plaintiffs, and was anterior to the time at which the plaintiffs came into possession. The plaintiffs, consequently, had no reason to complain of the admission of Newkirk's testimony. If Hamilton had pre-

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viously conveyed the property to the plaintiffs, a different rule would prevail. *Harness v. Harness*, 49 Ind. 384; *McFerran v. McFerran*, 69 Ind. 29.

The death of Rebecca Hamilton having been suggested, it is ordered that judgment be entered as of the May term, 1885, during which this cause was submitted.

The judgment is affirmed, with costs.

Filed May 26, 1887.

No. 12,388.

HILGENBERG v. RHODES ET AL.

TAX SALE.—Deed.—Permanent Improvements.—Adverse Title.—A purchaser of land at a tax sale, who has received a tax deed and taken possession and made permanent improvements, but whose deed is not effectual to convey title, can only recover for such improvements as were made after receiving his deed and before notice of an adverse claim to the land.

SAME.—Statute Construed.—When Recovery Had for Improvements.—Section 253, of the tax law of 1872, providing that the purchaser “shall be entitled to receive what such improvements are reasonably worth, to be assessed on the trial of said cause,” does not fix the cases in which there may be a recovery, but only secures to the purchaser the value of improvements in a case where he is entitled to recover.

From the Marion Superior Court.

I. Klingensmith and W. P. Adkinson, for appellant.

J. L. McMaster and A. Boice, for appellees.

ELLIOTT, J.—Hilgenberg obtained a tax deed for the land in controversy in 1875, and, while conceding that the deed is not effectual to convey title, contends that it is effectual to transfer the lien of the taxing power to him, and to invest him with a right to recover the value of permanent improvements put on the land by him. The trial court sustained

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his claim to a lien, and gave him part of the sum expended by him in improving the property. He is not content with the award of a part of the sum expended for improvements, but claims that the entire sum expended should have been awarded him.

The owner of the land, at the time the taxes were assessed, was a married woman, named Mary A. Day, and it was encumbered by a mortgage executed to Sophia E. Rhodes. The tax sale was made on the 25th day of February, 1875, and the deed executed on the 28th day of February, 1877. Sophia E. Rhodes instituted this suit to foreclose her mortgage, making Hilgenberg a party, and he was served with process on the 22d day of September, 1877. The trial court allowed him for the value of improvements made prior to that date, but refused to allow him for improvements made after that time.

The appellant's counsel quote from section 253 of the tax law, and assert that "this statute means that the holder of such tax deed shall have compensation for all improvements made by him at the date of the trial." This position is not tenable. It was not the intention of the Legislature, in the section of the statute under immediate mention, to give a purchaser at a tax sale a right to have the value of improvements made by him assessed and awarded absolutely and in every case. It certainly would not give a right to recover for improvements made after a proper tender and offer to redeem had been made; for, surely, no one would doubt that if, in defiance of such a tender and such an offer, the purchaser makes improvements, he would not be allowed to recover their value. This illustration is sufficient to prove that the statute can not have such an elastic construction as that claimed for it by appellant's counsel. The provision quoted by counsel reads, the purchaser "shall be entitled to receive what such improvements are reasonably worth, to be assessed on the trial of said cause." This is a provision securing to

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the purchaser the value of the improvements in a case where he is entitled to recover, but it does not fix the cases in which there may be a recovery. It does not provide for a recovery in a case where bad faith exists, where there has been a tender and an offer to redeem; nor, indeed, does it prescribe the cases in which there may be a recovery; it simply provides what shall be assessed when the proper case is presented authorizing any assessment.

We do not doubt that, under the provisions of sections 212, 253 and 256 of the tax law of 1872, a purchaser at a tax sale may, as a general rule, recover compensation for improvements made after the expiration of two years from the date of the sale; but there are exceptions to this general rule, as is shown by the illustrations we have already given. In our opinion this case constitutes an exception to the general statutory rule; or, more accurately speaking, is not within the rule. Mrs. Day was a married woman, with a special right to redeem; the fact and the law respecting her right were known to the appellant; suit had been brought to foreclose a lien created by her, to which suit the appellant was made a party; and he was challenged to assert his rights, and notified that they were subordinate to those of the plaintiff in that suit. Under such circumstances, he had no right after notice of the suit to make permanent improvements at the cost of the owner of the land. It was an act of bad faith on his part to persevere after such a challenge and such knowledge. In analogous cases a principle has been often asserted which should control here, and that is, that the claimant can not make improvements on the land after he receives fair notice that he has no title. *Osborn v. Storms*, 65 Ind. 321; *Walker v. Quigg*, 6 Watts, 87; *Ethel v. Batchelder*, 90 Ind. 520. After service of process he proceeds at his peril. *Shand v. Hanley*, 71 N. Y. 319; *Wilkinson v. Pearson*, 23 Pa. St. 117; *Aurand v. Wilt*, 9 Pa. St. 54; *Haslett v. Crain*, 85 Ill. 129.

We must accept as trustworthy the evidence approved by

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the judgment of the triers of the fact, and as that evidence sustains the finding, we must treat as a correct conclusion on the facts that approved by the trial court. *Julian v. Western Union Tel. Co.*, 98 Ind. 327 ; *Binford v. Adams*, 104 Ind. 41. Judgment affirmed.

Filed May 24, 1887.

111	170
114	63
111	170
128	239
111	170
132	29
111	170
142	583
111	170
145	513
111	170
150	171
111	170
155	8
111	170
166	286
166	287

No. 13,658.

VIGO TOWNSHIP v. THE BOARD OF COMMISSIONERS OF KNOX COUNTY.

COUNTY.—*Treasurer.*—*Agency.*—*Respondeat Superior.*—A county treasurer is not an agent of the county in such a sense that the maxim *respondeat superior* can be invoked. His duties are prescribed by law, and in the exercise of his office he is in no way subject to the control of the board of county commissioners.

SAME.—*Township Funds.*—*Defalcation of Treasurer.*—*Liability of County.*—A county treasurer is not the agent of the county in respect to funds collected by him for townships, and, in the absence of a statute so providing, the county is not liable to the townships for his defalcations.

SAME.—*Trust.*—*Township Funds Credited to General Fund of County.*—The board of county commissioners has no control of the funds which the law requires to be collected for and apportioned to the townships, and occupies no relation of trust concerning such funds in the treasurer's hands, unless they have actually been paid into the corporate treasury, i. e., credited to the general fund of the county.

SAME.—*Auditor.*—*Warrants for Township Funds.*—*Create no Obligation Against County.*—In drawing warrants upon the county treasurer for the funds in his hands belonging to the townships, the county auditor does not act as the agent of the county, nor do such warrants create any obligation against it.

SAME.—*Compromise of Suit Against Defaulting Treasurer.*—*Rights of Townships.*—*Action Against County.*—Where a suit has been instituted by the county auditor upon the official bond of a defaulting county treasurer, and a compromise is effected, whereby a certain part of the amount converted is accepted in full satisfaction, a township which suffered a loss to its funds by the defalcation is entitled to its proportion of the sum recovered, but it can not maintain an action therefor against the

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county, unless it is shown that the share belonging to it has been covered into the county treasury to the credit of the general fund.

From the Knox Circuit Court.

W. H. DeWolf, S. N. Chambers and E. H. DeWolf, for appellant.

W. A. Cullop, G. W. Shaw and C. B. Kessinger, for appellee.

MITCHELL, J.—During his incumbency in the office of county treasurer of Knox county, Spear S. Hollingsworth, in pursuance of his duty in that behalf, collected various funds belonging to Vigo township, one of the townships within the county above mentioned. Hollingsworth became a defaulter in his office, by appropriating public moneys which came into his possession, to the amount of \$78,000. Among the moneys so appropriated were the funds collected for and belonging to the township of Vigo. Subsequently the State, on the relation of the county auditor of Knox county, instituted a suit upon the official bond of the defaulting treasurer. This suit was compromised by the county auditor and the bondsmen, the latter agreeing to pay over to the succeeding treasurer the sum of \$35,000. After the annual settlement in 1886, the county auditor drew his separate warrants on the treasurer of Knox county for the full amount of each several fund which appeared by the records in his office to belong to Vigo township. These warrants were duly presented by the township trustee, to whom they were made payable. Payment was refused, on the ground that there were no funds in the treasury for that purpose. The warrants were afterwards presented for allowance to, and were rejected by, the board of commissioners. Acts 1885, p. 80. This suit was then brought, the claim of the township being, that upon the facts substantially hereinbefore stated, the county became liable for the payment of the warrants. The circuit court gave judgment against the township.

The argument in favor of the right of the township to

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look to the board of commissioners for payment is predicated upon the assumption that the defaulting treasurer was the agent of the county, and that the board of commissioners became, in respect to the several funds, in legal effect, the trustee of the township. Hence, the claim is, since the wrongful appropriation of the money was the dereliction of the county's agent in respect to a fund toward which the board of commissioners occupied a fiduciary relation, the latter must make good the loss to the township occasioned by the default of its agent. It is said that the board of commissioners must be treated as the guardian or trustee of the township, because the latter can neither levy nor collect taxes, except through the agency and concurrence of the former, and because of the supervisory power of the board over the accounts and expenditures of the township trustees, and for the further reason, that the township trustee has no power to bring suit, or to control the county auditor in bringing or conducting a suit against the treasurer or his bondsmen. In our opinion, the assumptions upon which the argument rests are without legal foundation.

In the first place, a county treasurer is in no such sense the agent of the county as that the maxim *respondeat superior* can be invoked. This maxim has its foundation upon the right of the principal to select his agents, to control, direct and hold them responsible while in his service, and to discharge them on account of negligence, incompetency, or other delinquency, at his pleasure. If the principal has neither the right to select nor appoint, nor to direct, control or prescribe the duties of the agent, nor to discharge him in case of refusal to comply with the duties prescribed by the principal, the rule has no application. This rule is applicable to corporations as well as to natural persons. Dillon Munic. Corp., section 974.

Counties, in a very important sense, occupy a double relation. In one relation a county is a municipal corporation, charged with corporate functions and duties, and invested

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with corporate powers. These are exercised for the benefit of the municipality, and in respect to these the county is responsible. A county is also a territorial and political division of the State, established as an instrumentality of government and municipal regulation. *Maxmilian v. Mayor*, 62 N. Y. 160 (20 Am. R. 468); *Eastman v. Meredith*, 36 N. H. 284.

Some of the duties of county boards, as well as other county officers, relate to and are exercised in the discharge of their functions as governmental agencies. Of this character are the duties of the board, as also those of the county treasurer and auditor, so far as they are connected with the revenue system of the State. In exercising these duties the officers exert a power delegated immediately to them by the State, for the benefit of all the citizens who are affected by the sovereign power which pertains to the levying and collecting of taxes. The county as a municipality is not specially interested in the exercise of these powers, except so far as they relate to its own municipal affairs. It is, hence, not liable for derelictions of officers in respect to their conduct as mere agents of the government.

Of course, in respect to such duties as are directly and absolutely imposed upon a municipal corporation by law, or which concern interests specially committed to its charge, and for the performance of which certain agents or officers may have been designated, the delinquency or default of the agent may, nevertheless, render the municipality answerable. *Dillon Munic. Corp.*, section 980.

Liability in such cases grows out of the fact that the municipality failed to discharge some corporate duty which the law expressly and primarily laid upon it, and not upon the officer or agent.

The relations between the board of commissioners of a county and a county treasurer are such, that all the requisites to make the county answerable as principal for the defalcations of the treasurer as agent are wanting.

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The treasurer is in no way dependent upon the board for his appointment to or continuance in office. His duties are all prescribed by law, and in the exercise of his office he is in no way subject to the control of the county board. He performs official duties for the State as well as for the county, and for every township and municipality within the territorial boundaries of the county. His duties are, therefore, not for the special or peculiar benefit of the county, nor for its interest, in any different sense than are they for the benefit or interest of the State, or the other municipalities in whose behalf the law requires the county treasurer to perform official service. He is a person selected in the manner prescribed by law, and has certain public functions to perform, which are all prescribed by statute and primarily laid upon him, and for the performance of which he is held civilly and criminally responsible. He is not, therefore, the agent of the county in respect to funds collected by him for townships; nor can the county be held answerable for his delinquency in the absence of an express statute making it liable. This is according to the principle deducible from the authorities, which hold, in effect, that a municipal corporation is not to be regarded as principal, and, therefore, liable for the defalcations and delinquencies of its public officers in failing to perform public duties which the law has laid upon them, and in respect to which the municipality is neither invested with corporate power nor charged with any corporate duty or statutory liability, and from the performance of which it derives no special advantage. The officer, under such circumstances, is regarded as an independent public agent, or *quasi* civil officer of the government, personally answerable for his misconduct or official delinquencies, and not the agent or servant of the municipality. Omissions of duty imposed upon such an officer by law, however injurious they may be to others, are not injuries for which the corporation, of which he is nominally an officer, is liable. *Hannon v. County of St. Louis*, 62 Mo. 313; *Morrison v. City of Lawrence*, 98 Mass.

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219; *Fisher v. City of Boston*, 104 Mass. 87 (6 Am. R. 196); *Ogg v. City of Lansing*, 35 Iowa, 495 (14 Am. R. 499); *Maxmilian v. Mayor*, 62 N. Y. 160; *Prather v. City of Lexington*, 13 B. Mon. 559; *Mead v. City of New Haven*, 40 Conn. 72 (16 Am. R. 14); *Eastman v. Meredith*, 36 N. H. 284; *Fowle v. Alexandria*, 3 Peters, 398.

Whatever supervisory power boards of commissioners have in respect to approving official bonds, inspecting the accounts of, and making annual settlements with, county treasurers, is not committed to them as duties or functions pertaining to the municipal corporation, but rather as the exercise of a portion of the administrative or political power of the State. In all that the commissioners are authorized to do in respect to the control or supervision of the county treasurer, or his duties, or in respect to the levying and collection of taxes, they become merely a part of the official machinery which is organized within each county for the purpose of raising revenue for State, county, township and other local purposes. *Lorillard v. Town of Monroe*, 11 N. Y. 392; *Dewey v. Board, etc.*, 62 N. Y. 294.

It follows from what has preceded, that boards of commissioners can occupy no relation of trust in respect to the funds which come into the county treasurer's hands for the benefit of the several townships, unless such funds have actually been covered into the corporate treasury. It is quite true, that the Legislature has committed to county boards certain supervisory powers over the official conduct of township trustees, in regard to levying township taxes, incurring debts, and the inspection of their accounts, and the like. But without particularizing further, it is enough to say that county boards have no direction or control whatever of the funds which the law requires to be apportioned to and collected for the benefit of the several townships. Section 5995, R. S. 1881, enacts that the township trustee shall superintend all the pecuniary concerns of the township; that he shall, with the advice and concurrence of the county

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board, levy a tax on the property of his township for township purposes, and report the same to the county auditor, who shall enter the same on the tax duplicate to be collected by the treasurer as other taxes are collected. So in respect to road tax, and every other fund provided for the benefit of the several townships. There is a special statutory provision directing the manner in which the money is to be raised and put into the hands of the county treasurer. The treasurer is required to make annual settlements with the county auditor for the amount of taxes for which he is to stand charged. Section 6500, R. S. 1881. Immediately after the annual settlement with the auditor, he is required to pay over to the proper township trustee, upon the warrant of the auditor, all the moneys in his hands belonging to each township. The duty of apportioning the several funds to the townships is imposed by law upon the county auditor, while the duty of collecting and paying the funds over to the several townships is laid directly upon the county treasurer. With the powers and duties of these officers in respect to those funds, the boards of commissioners have no authority whatever to interfere. In each case the duty of the officer relates directly to the township, and may be enforced by mandate in case of the officer's neglect or refusal to act. By that method the auditor might have been compelled to institute suit for the benefit of the township in case of his refusal. In respect to all matters pertaining to the collection, keeping and paying over to the townships the funds belonging to them, the county treasurer acts on his own responsibility, and independently of the board of commissioners of the county. *Halbert v. State, ex rel.*, 22 Ind. 125.

The conclusion is thus reached that the board of county commissioners occupied no relation of trust to the township funds in question, and that the county is not liable on the ground that the defaulting treasurer was its agent, for whose delinquency the county is answerable.

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It is said, however, that the warrants sued on are, in effect, the promissory notes of the county, and that the presumption must be indulged that they were issued upon a valid consideration, and that, hence, the county is liable for their payment. *Brownlee v. Board, etc.*, 81 Ind. 186, and *Board, etc., v. Day*, 19 Ind. 450, are relied on as sustaining this view.

The cases cited were suits upon warrants issued for obligations of the county—corporate debts. In such cases it may well be that warrants drawn by the auditor upon the treasurer are, in some sense, analogous to promissory notes, and presumptively upon a valid consideration. In the case under consideration it affirmatively appears, however, that the warrants were not drawn to satisfy a county or corporate obligation. In drawing the warrants upon the county treasurer for the several funds in his hands apportioned and belonging to the several townships, the county auditor does not act as the agent of the county. In such act he is discharging a governmental function for the benefit of the township. The warrant creates no obligation against the county; it is simply the authority upon which the county treasurer pays over, and the township trustee receives, the funds belonging to his township.

Lastly, it is contended that the county is liable to the township for the proportionate share of the thirty-five thousand dollars received upon the compromise made by the county auditor with the bondsmen. It is said the county is liable because the money has been paid into the county treasury. Doubtless this contention would be maintainable if it appeared that the money had been actually covered into the general fund of the county. This, however, does not appear. All that is shown in that regard is, that the county auditor compromised the suit on the official bond of the treasurer, and received and accepted thirty-five thousand dollars in full satisfaction for all the moneys appropriated by Hollings-

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worth. It does not appear that the money has been covered into the treasury to the credit of the general fund of the county. It must be presumed that the auditor has performed his official duty, which clearly was to ascertain the proportionate share of the moneys recovered justly belonging to Vigo township, and to put it into the hands of the treasurer subject to his warrant in favor of the township trustee. In contemplation of law, moneys collected for the townships do not go into the corporate or county treasury. Such moneys, according to the policy of the statute, remain in the hands of the county treasurer as an independent public officer, for the benefit of the townships, until they are paid over by him upon the warrant of the auditor. *Lorillard v. Town of Monroe*, 11 N. Y. 392.

In the treasurer's hands the moneys are impressed with a trust for the benefit of the townships. Being trust funds, so far as they have been recovered and are capable of ascertainment, they must be restored to the proper *cestui que trust*. If they have been paid into the corporate treasury of the county—that is, credited to its general fund—it is the duty of the county board, upon proper application, to restore them. If the auditor has turned them over to the county treasurer, to be held by him in his official capacity, it is the duty of the auditor and treasurer to ascertain the amount due the township and to restore it to the proper trustee. *Dewey v. Board, etc., supra*. There can be no difficulty in ascertaining the amount of the trust fund, and in whosoever custody it is found it may be reached for the benefit of the township. *Rowley v. Fair*, 104 Ind. 189; *Bundy v. Town of Monticello*, 84 Ind. 119; *Naltner v. Dolan*, 108 Ind. 500.

The judgment is affirmed, with costs.

Filed May 27, 1887.

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No. 12,827.

**THE LOUISVILLE, EVANSVILLE AND ST. LOUIS RAILWAY
COMPANY v. DONNEGAN ET AL.**

CONTRACT.—*Construction of Railroad.*—*Estimates of Engineer.*—*Stipulation that They Shall be Conclusive.*—*Recourse to Courts.*—A stipulation in a contract between a railroad company and a contractor, that the estimates made by the former's engineers as to the quality, character and value of the work performed by the contractor shall be final and conclusive against the latter, "without further recourse or appeal," can not deprive him of the right to resort to the courts for the recovery of what may be due him, notwithstanding the estimates.

SAME.—*Taking Control of Work from Contractor.*—A provision in the agreement, that, if the contractor fails to employ such a force of workmen as the company's engineer may deem adequate to a completion of the work within the time fixed, the latter may do so and charge the contractor with the amount paid in wages, must be given a reasonable construction, and control of the work can not be taken from the contractor without sufficient cause.

SAME.—*Competency of Engineers.*—*Implied Undertaking as to.*—In such case there is an implied undertaking on the part of the railroad company that the engineer to be put in charge shall be competent, honest and reasonably careful, and that he will not make delays, caused by his wrongs, a pretext for taking the work out of the control of the contractor.

SAME.—*Material Furnished at Direction of Engineer.*—*Compensation Notwithstanding Contract.*—Where the work which the contractor undertakes to do is to be performed under the direction of the railroad company's engineer, who is clothed with almost absolute authority as to the manner in which it shall be done, the contractor is entitled to pay for piling of the original length ordered by the engineer and subsequently shortened at his direction, notwithstanding a provision in the contract that the contractor is to be paid for the lineal feet of piling actually used.

EVIDENCE.—*Experts.*—*Railroad Builders.*—*Time of Performing Work.*—*Opinion.*—Persons experienced, as contractors, in railroad building are experts, and may testify that, but for delays caused by the railroad company and its engineers, the work contracted for could have been completed within the time fixed in the contract.

SAME.—*Action by Railroad Contractor.*—*Cost of Work.*—In an action by a contractor against a railroad company, wherein it is alleged that the defendant had hindered and delayed the plaintiff in the prosecution of the work, and had wrongfully taken it out of the latter's control, and completed it at a reckless and extravagant cost and charged the plain-

111	179
114	445
111	179
135	55
111	179
131	423
111	179
151	502
111	179
158	672
111	179
162	326
111	179
168	216

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tiff therewith, evidence as to the reasonable cost of the work is competent.

SUPREME COURT.—*Brief.*—*Mere Restating of Causes for New Trial.*—The mere restating in a brief of the causes assigned for a new trial does not meet the requirements of the rule of the Supreme Court relating to briefs.

SAME.—*References to Record.*—Parties asking for a reversal of a judgment must furnish references to such portions of the record as will show that error intervened in the proceedings below.

From the Vanderburgh Circuit Court.

A. Iglehart, J. E. Iglehart and E. Taylor, for appellant.

J. S. Buchanan, H. C. Gooding and C. Buchanan, for appellees.

ZOLLARS, C. J.—In April, 1881, appellees, as partners, entered into a written contract with the railway company for the construction of a certain section of its road in the State of Illinois. It was therein agreed that the work should be completed on or before the 1st day of August, 1881.

It was expressly stipulated that time should be of the essence of the contract.

Appellees undertook to do all the grading, masonry, and all such other work as might be necessary to construct the stipulated section of the road in accordance with the specifications, made a part of the contract, as they might be applicable, and agreeably to the directions of the engineer in charge of the work, given from time to time during the progress of the work.

The work was to be paid for by the company upon monthly and final estimates made by its engineers, and it was expressly stipulated that the estimates thus made by the engineer in charge of the work should be conclusive as against appellees, "without further recourse or appeal." The chief engineer might review these estimates, and if he did so, his estimates were to be substituted for the estimates reviewed. For extra work the company was to pay the cost and ten per cent. additional. The extra work was to be estimated by

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the company's engineer, and these estimates were also to be final and conclusive as against appellees.

Appellees were to employ such a force of workmen as the engineer might deem adequate to the completion of the work within the time fixed. If they did not employ such a force as the engineer might thus deem adequate, he might employ such number of workmen as in his judgment would be necessary, and at such wages as he might find necessary and expedient; pay all such persons, and charge appellees with the amount as so much money paid to them upon the contract. Power was also given to the company's chief engineer to annul the contract, upon a written notice to appellees, if, in his judgment, the work was not prosecuted by them in a proper manner and with sufficient speed. It was also stipulated that, upon thirty days' notice to appellees, the company might, at any time, without cause, annul the contract, in which event they should be entitled to pay for work done up to that time. The right was reserved to the company's chief engineer to order, in writing, any modification or alteration to be made in the specifications, profiles and plans, and in like manner to direct and order the omission of any portion of the work mentioned in the specifications, or to substitute any other work for such portions. If he should determine upon earthworks, bridges, culverts, walls, or other work in addition to that embraced in the contract, appellees were bound to do such work for the prices agreed upon for like work, and upon the same terms and conditions, except with regard to the time of completing the work, which might be reasonably extended at the discretion of the chief engineer.

The first paragraph of appellees' complaint was based upon that contract, and its violation by appellant.

It is alleged therein that appellees began the work at once, furnished material, and continued to construct the road under the contract until in August, 1881, when the railway company, without right, and against their will, took charge of the work and prosecuted the same to completion; that they,

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without fault on their part, were prevented from completing the section of road specified in the contract within the prescribed time, because of the company failing to procure the right of way, because of extra work ordered by the engineer, because of the engineer failing to furnish the height, centers and specifications of bridges and culverts, because of changes in the work ordered by the engineer, and because of the incompetency of the engineers; that, after the work was taken out of their hands, the company prosecuted the same at a reckless and exorbitant cost, far in excess of what was required or necessary; that, subsequent to the written agreement, the amount to be paid by the company per cubic yard for earth was fixed by a parol agreement; that in the final estimate the amount returned by the engineer as due to appellees for earth work done by them was too small, giving the figures; that the engineer ordered and directed that the piling for bridges should be of a certain length; that, being ignorant as to the proper length required, they obeyed, and, under the contract, were compelled to obey the instructions of the engineer; that, after the piling were furnished, the engineer ordered them to be shortened, and in the final estimate allowed appellees only for the amount of lineal feet actually used, and neglected and refused to allow them for the amount so cut off; that an excessive, unwarranted and fraudulent amount was charged against appellees by the engineer for placing bridge and culvert timbers furnished by them before their discharge from the work, which amount the engineer, in his final estimate, deducted from the amount due to them; that, subsequent to the written agreement, it was orally agreed between the parties, that appellees should be allowed \$2 per thousand feet extra on a large amount of bridge and culvert timbers, because the same was purchased by them at an extra cost, at the request of the company through its proper officers; that in the final estimate by the engineer said extra amount so agreed upon was not allowed to appellees; that the company ordered appellees to remove

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their pile-driver some six miles beyond the section to do extra work, and agreed to pay for such removal and extra work, and that the amount agreed upon was not returned by the engineer in his final estimate; that by the failure of the company to procure right of way, and the failure of the engineer, upon request of appellees, to furnish heights and centers, and to lay out the work, their men were left idle, to their damage in a large sum, giving the amount; that in the final estimate the engineer did not return the full amount due to appellees for iron furnished by them.

It is averred that the engineers in charge of the work, whose orders appellees were bound to obey, and who made the monthly and final estimates, were incompetent and unfit for the duties assigned them; that appellees were not allowed to inspect either the monthly or final estimates, and that, acting in collusion with the company, the engineers, at the time knowing that their estimates were too low and false and fraudulent, made them as they did for the purpose of cheating and defrauding appellees.

Another written contract, similar in all essentials to the above mentioned, except as it had reference to other sections of the road, was entered into by the parties at about the same time, for the construction of another section of the railroad in the State of Illinois. That contract provided that the work should be completed on or before the 1st day of August, 1881.

The second paragraph of appellees' complaint was based upon that contract, and its violations by appellant. The wrongs charged upon appellant in that paragraph are of the same nature as those charged in the first paragraph, and were charged in substantially the same way.

In June, 1881, a third written contract was entered into between the parties, for the construction of certain sections of the road in the State of Indiana. That contract, also, was similar, in essentials, to the others, except as it had reference to other sections of the road.

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The third paragraph of appellees' complaint was based upon that contract, and violations of it by appellant. And here again the wrongs charged upon appellant are of the same nature, with the exception of some additional charges as to stone, etc., as those charged in the first paragraph of the complaint, and were charged in substantially the same way.

The fourth paragraph of the complaint is based upon the three contracts above mentioned, and alleges that they all related to work upon the same road, and in fact constituted but one contract, and were so treated by the parties; that payments were made upon all three, indiscriminately; that the accounts were so kept by the railway company and the appellees that amounts due to them upon and under any one of the separate contracts could not be distinctly ascertained; that the work done and materials furnished by appellees up to the time when the work was wrongfully taken charge of by the railway company amounted to \$80,000; that if they had been allowed to complete the work under the contract, as they would have done but for the wrongs of the railway company, which are stated as in the other paragraphs, there would have been due to them from the railway company \$96,000; that the fair and reasonable cost of furnishing the materials and doing the work according to the contract would not have exceeded \$65,000; that appellees were entitled to recover the difference between that amount and \$80,000, for materials furnished and work done under the contract, and \$5,000 profits, which would have been made by them on the work done and materials furnished by the railway company in the completion of the work, etc.

It is sufficient here to state that the answers by appellant generally and specially denied all indebtedness, and all charges of wrong against it and its engineers and agents, and all charges of mistake and incompetency on the part of its engineers, whether as connected with estimates or otherwise. They further charged that the failure on the part of appellees to complete the work within the time fixed was caused

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by their own neglects and wrongs; that the company made liberal advances to them as the work progressed, and that they fraudulently failed to pay for materials and labor, and thus involved the company in expensive litigations.

It was further alleged, that the company did not take the work from appellees as charged; that, on the contrary, the work was done by their employees under foremen of their own choosing, subject only to the proper direction of the company's engineers and such supervision in the disbursement of moneys as was rendered necessary by the fraudulent conduct of appellees, etc.

The trial court made the following special findings of facts and conclusions of law:

"SPECIAL FINDINGS.

"1. That the plaintiffs and defendant entered into the contracts mentioned and described in the plaintiffs' complaint, as therein stated.

"2. That in due time, and with a reasonable force, the plaintiffs entered upon the work of performing and completing the several contracts.

"3. That on account of an insufficient number, and the incompetency or negligence, or both, of the local or resident engineers upon all the sections embraced in the two contracts in Illinois and the contract in Indiana, the prosecution of the work by the plaintiffs was greatly interfered with and delayed.

"4. That when the contractors were ready to do the work, the necessary staking and aligument of the road had not been made or done, and the engineers' work in this respect, and also in furnishing the necessary data for bills of lumber for bridges, and proper designations as to where bridges, culverts, and piles were needed and expected to be placed, and the failure to procure the right of way in different places, each and all, substantially interfered with and delayed the prosecution of the work.

"5. That owing to the negligence, carelessness, incompe-

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tency and mistakes of the company's engineers, the statements of the work were in many instances incorrect.

"6. That the plaintiffs could, and, so far as the evidence shows, would, have completed each of the several contracts mentioned in the complaint in the manner therein prescribed, and within the time limited by said contracts, if they had not been hindered and delayed by the fault, negligence, insufficiency and incompetency of the defendant's engineers.

"7. That the work was taken out of the control of the plaintiffs on the 20th day of October, 1881, and that the agents of said railway company incurred and permitted more expenses than even at that season of the year were necessary or proper for the completion of the work.

"8. That had the defendant's employees been without fault, negligence or incompetency, and had they not caused the delay of and interference with the work, the several contracts could and would have been completed at much less cost and expense, before the season had become unfit for that kind of work, and by the 1st of November, 1881.

"9. That the work was conducted by the employees of the defendant, after it was taken out of the hands of the plaintiffs, in a negligent, careless and reckless manner, both as to the manner of doing the same and making payments therefor, by reason of which that part of the work was made to cost at least twenty per cent. more than it ought to, or would have cost, if it had been done prudently and with proper regard to the rights of the plaintiffs.

"10. That a fair estimate of the work done upon the contracts at the prices agreed upon, and for extra work, and including reasonable estimates for losses on account of mistakes and delays, would have been \$103,500.

"11. That a fair estimate of the money actually paid by said railway company to Donnegan & Co., and properly paid in the completion of the work under the contracts, would not exceed \$90,368.

"12. As a conclusion of law upon these facts and the evi-

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dence in the case, as taken by the stenographer, the court finds, that there is due to the plaintiffs from the defendant the sum of thirteen thousand and one hundred and thirty-two dollars (\$13,132), with interest at six per cent., allowed as damages, from the respective times at which the same should have been paid, amounting to twenty-three hundred and fifty dollars (\$2,350), making the sum of fifteen thousand four hundred and eighty-two dollars (\$15,482).

“13. Thereupon the court finds, that the plaintiffs are entitled to recover of and from the defendant, upon their complaint herein, the sum of fifteen thousand four hundred and eighty-two dollars (\$15,482).

“WILLIAM F. PARRETT,
“Judge V. C. C.”

The first proposition discussed by appellant's counsel is, that the court below erred in its conclusion of law upon the above facts.

One of their contentions is, that in order to avoid the conclusive effect of the estimates made by the engineers of the railway company, it was incumbent upon appellees to prove that those estimates were the result of fraud, accident or mistake; that the trial court did not so find, and that, hence, appellees are bound by those estimates, and can not recover in this action.

As we have seen, one of the stipulations in the contract was that the engineers of the railway company should make final estimates of the quality, character and value of the work done by appellees, and that such final estimates should be final and conclusive as against appellees, “without further recourse or appeal.” That stipulation in the contract did not, and could not, deprive appellees of the right to resort to the courts for a redress of wrongs, and for the recovery of whatever may have been due them.

The reason why such a stipulation is invalid has been so fully stated by this court that nothing more is required here than a citation of the cases. *Bauer v. Samson Lodge, Knights*

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of *Pythias*, 102 Ind. 262, and cases there cited; *Supreme Council of the Order of Chosen Friends v. Garrigus*, 104 Ind. 133 (54 Am. R. 298).

But counsels' contention can not be maintained upon any theory. They seem to have overlooked some of the findings of the court. The fifth finding was, that, owing to the negligence, carelessness, incompetency and mistakes of the company's engineers, the statements of the work were in many instances incorrect. That finding is entirely sufficient to show that the estimates made by the company's engineers were incorrect, and to entitle appellees to recover what was due them, notwithstanding such estimates. The tenth and eleventh findings are in accord with, and lend support to, the fifth.

It is further insisted by appellant's counsel, that there is no finding that appellees were wrongfully excluded from the work, and that such a finding was necessary to support the conclusion of law. That the work was taken out of the control of appellees by the railway company, is definitely stated in the seventh finding. And, taking the findings as a whole, we think they sufficiently show that appellees were wrongfully excluded from the work.

The contract provided that if appellees did not employ such a force as the company's engineer might deem adequate to a completion of the work within the fixed time, he might employ such number of workmen as in his judgment would be necessary, pay them such wages as he might find necessary and expedient, and charge appellees with the amount, as so much paid to them under the contract, etc. Those provisions of the contract must be given a reasonable construction. It certainly was not intended by the parties that the engineer in charge should arbitrarily, at any time, and without any sort or shadow of reason, take the work out of the control of appellees and employ men at his pleasure. Nor could it have been intended that appellees should be subject to the whims of an incompetent, negligent, or dis-

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honest engineer. And still less could it have been intended that the engineer might take the work out of the control of appellees, and employ men, etc., on account of delays caused by his own fault, negligence and incompetency.

There was, at least, an implied undertaking, on the part of the railway company, that the engineer to be put in charge, with such extended powers, should be competent, honest, and reasonably careful, and that he should not make delays caused by his wrongs a pretext for taking the work out of the control of appellees.

It was stated in the special findings, that on account of an insufficient number, and the incompetency and negligence of the local engineers, the prosecution of the work was greatly interfered with; that appellees were hindered and delayed in the prosecution and completion of the work by failure on the part of the company to procure right of way, and by failure on the part of its engineers to furnish proper stakes to locate bridges, culverts, etc., and that appellees could and would have completed the work within the time limited by the contract if they had not been hindered and delayed by the fault, negligence, insufficiency, and incompetency of appellant's engineers, etc. As before stated, the findings show that the work was taken out of the control of appellees, and, as we think, show that it was wrongfully taken out of their control.

It is further contended by appellant's counsel, that the several findings of facts by the court below are not sustained by sufficient evidence.

This court will not undertake to settle the conflicts that may be found in the sixteen hundred pages of evidence. That was for the learned judge who tried the case below, and had opportunities of judging of the credibility of witnesses which an appellate court can not have. We have ascertained that there is evidence tending to sustain all of the findings of the court. That fact having been ascertained,

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the established rule applies which forbids a reversal of the judgment upon the weight of the evidence.

In appellant's motion for a new trial fifty-one causes were assigned, the most of which have reference to the admission and exclusion of evidence. These are all urged here, but as to the most of them appellant's counsel have done nothing more in their brief than to restate the causes. That does not meet the requirements of the rule in relation to briefs in this court. In some instances the pages of the record, where the rulings of the court may be found, are not given. In many others it is impossible for us to determine, from the limited amount of the evidence pointed out by references to the pages of the record, whether or not there was error in the rulings.

Parties asking for a reversal of a judgment must furnish references to such portions of the record as will show that errors intervened in the proceedings below.

One of appellees was allowed to testify that appellant's engineer in charge of the work, on one occasion, directed that piling of a certain length should be furnished, and that, after they were furnished upon the ground, of the length directed, the engineer ordered that portions should be cut off, which was done.

Appellant's counsel insist that there was error in the admission of that testimony, for the reason that, by the contract, appellees were to be paid only for the lineal feet of piling actually used in the work. We are not convinced that the admission of that testimony was erroneous. If it was competent for any purpose its admission was not available error. It was competent, we think, as tending to show, in some degree at least, that the engineer was incompetent and careless, and that appellees were hindered and delayed in the prosecution of the work, and, hence, were not in default. What weight should have been given to the testimony is another question; we have no means of knowing how much importance the court below may have attached to it, nor that

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it was considered at all by the court in fixing the amount of recovery in favor of appellees; but, assuming that it was, and that the evidence was admitted for that purpose alone, we are yet not convinced that its admission was an error such as would justify this court in overthrowing the judgment. Appellant's engineer, under the terms of the contract, was put in charge of the work with almost absolute authority as to the manner in which the work should be done. Having and exercising such authority as the representative of appellant, it can not be said that appellees, and not appellant, should suffer the loss occasioned by his mistake or wrong in ordering the piling to be of a certain length.

One of appellees was also allowed to testify that, but for the delays, which he had mentioned as having been caused by appellant and its engineers, the work contracted for could have been completed within the time fixed in the contract.

Some of appellees' subcontractors were also allowed to testify that they could have completed the work embraced within their contracts on or before certain named dates, within the time for completion fixed by the contract between appellant and appellees. It is contended by appellant's counsel that the testimony was incompetent, because it consisted of inferences or opinions.

The witnesses were railway builders, who, by reason of their experience, may properly be termed experts. An expert has been described as nothing more than a man of experience in the particular business to which the inquiry relates; as one having peculiar knowledge or skill in reference to the subject-matter of inquiry; as a person instructed by experience. *Lawson Exp. and Opin. Ev.*, pp. 195-6; *Doster v. Brown*, 25 Ga. 24; *Mobile Life Ins. Co. v. Walker*, 58 Ala. 290.

Non-expert witnesses may state their opinions as to matters with which they are especially acquainted, but which can not be specifically described. *Carthage T. P. Co. v.*

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Andrews, 102 Ind. 138 (52 Am. R. 653); *Yost v. Conroy*, 92 Ind. 464 (47 Am. R. 156).

It has been said that a non-expert witness must, so far as possible, state the facts upon which he bases his opinions; that when the case is one in which all the facts can be presented to the jury, no opinion can be given; that there are cases where the witness can not put before the jury in an intelligible and comprehensible form the whole ground of his judgment or opinion, and that in such cases he may give his opinion, first stating the facts, so far as he can, upon which the opinion is based.

We agree with counsel as to the nature of the testimony to which they object, but considering the qualifications of the witnesses, the nature of the subject-matter of the inquiry, and the statements of facts by the witnesses, we think that the testimony was competent. A person of experience in building railways can, doubtless, form a more correct judgment as to the length of time required to construct and complete a section of the road than persons without such experience can, even though they may have knowledge of all the facts which can be stated by witnesses. *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18; *Jeffersonville, etc., R. R. Co. v. Lanham*, 27 Ind. 171; *Lawson Exp. and Opin. Ev.*, pp. 79, 95, 460, and cases there cited; *Rogers Exp. Test.*, section 116, and cases there cited.

We are not advised upon what ground appellant's question to appellee Conkey, as to the reliability and responsibility of appellees' subcontractors, was ruled out. It may have been upon the ground that the question was not within the scope of a proper cross-examination. In the absence of anything more than is shown in the briefs, we must presume that the court below ruled correctly.

Nor can we say that the court erred in admitting testimony as to the cost of delivering piling along the line of road.

Appellees contended that appellant had hindered and delayed them in the prosecution of the work, and had wrong-

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fully taken the work out of their control, and completed it at a reckless and extravagant cost, and charged them with it. As bearing upon that issue, it was competent for them to show the reasonable cost of the work.

We do not think that it would be profitable to extend this opinion further upon the several causes assigned for a new trial, all of which we have examined. In our examination of the record, assisted by the arguments of counsel, we have discovered no error which would justify a reversal of the judgment.

Judgment affirmed, at appellant's costs.

Filed May 26, 1887.

 No. 12,897.

BLAIR ET AL. v. KIGER ET AL.

CANALS.—*Lands Appropriated for Reservoir Purposes.*—*Title Acquired.*—The Wabash and Erie Canal Company acquired title in fee to land appropriated by it in 1846 for a reservoir to supply the canal with water.

SAME.—*Assessment of Damages.*—*Lapse of Time.*—*Presumption.*—After the lapse of so long a time since the appropriation of the land, it will be presumed that damages were assessed and tendered or were waived.

From the Fountain Circuit Court.

L. Nebeker, H. H. Dochterman and B. Crane, for appellants.

T. F. Davidson, for appellees.

ELLIOTT, J.—The stipulations of the parties narrow this investigation to the question of the nature and extent of the interest taken by the Wabash and Erie Canal Company in the land in controversy.

In 1846 or 1847 the canal company took possession of the

111	193
113	542
118	585
111	193
125	480
125	513
111	193
155	481
155	482

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land in dispute and cut down and burned the timber growing on it. A stream called Coal creek runs through the land and crosses the canal a short distance below the land claimed by the appellants. At the point where the stream intersected the canal a dam was constructed for the purpose of making a reservoir for supplying the canal. Guard-banks were constructed for more than half a mile up the creek, for the purpose of forming a basin, and locks were constructed at each end of the dam. The canal was fed from the water collected in the basin, and boats passed through it. Prior to the removal of the timber a survey was made and the number of acres required for the reservoir was ascertained.

The acts of the canal company in 1846 must be regarded as an appropriation of the land, and, after the long period that has elapsed since the seizure of possession, the presumption is that damages were assessed and tendered or were waived. *Brookville, etc., Co. v. Butler*, 91 Ind. 134, 135 (46 Am. R. 580); *Cooley Const. Lim.* (5th ed.), 695.

If there was an appropriation of the land for the purposes of the canal, then, under the rule declared in the decisions of this court, the canal company acquired the fee. *Water Works Co. v. Burkhart*, 41 Ind. 364; *Nelson v. Fleming*, 56 Ind. 310; *Cromie v. Board, etc.*, 71 Ind. 208; *City of Logansport v. Shirk*, 88 Ind. 563; *Brookville, etc., Co. v. Butler, supra*; *Shirk v. Board, etc.*, 106 Ind. 573; *Frank v. Evansville, etc., R. R. Co., ante*, p. 132.

In our opinion there was an appropriation of the land for the canal, for it seems quite clear to us that the reservoir was part of the canal, and not merely an incident. *Indiana, etc., Co. v. State*, 53 Ind. 575; *Sheets v. Selden*, 2 Wall. 177.

Reservoirs for supplying the canal with water are as much part of the canal as the locks and channel. The case is entirely unlike the *Brookville, etc., Co. v. Butler, supra*, for here the land was taken and used for a purpose essential to the existence of the canal, while there the pond was no part of the canal. In that case we said: "The pond which

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formed is not shown to have been a reservoir or basin of the canal, nor to have constituted any part of the channel." Here the basin was constructed as part of the canal, and the land was appropriated for that purpose.

Judgment affirmed.

Filed May 25, 1887.

No. 12,380.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY v. FARVER.

NEGLIGENCE.—*When Employer not Liable.—Contractor.—Master and Servant.*

—*Nuisance.*—Where work which does not necessarily create a nuisance, but is in itself harmless and lawful when carefully conducted, is let by an employer, who merely prescribes the end, to another who undertakes to accomplish that end by means which he is to make use of at his discretion, the latter is, in respect to such means, the master, and if a third person is injured by the negligent use thereof, the employer is not answerable.

SAME.—*Operating Portable Steam-Engine Near Highway.—Not Necessarily a Nuisance.*—It is not necessarily a nuisance to operate a portable steam-engine, in a careful manner, in close proximity to a public highway.

SAME.—*Railroad.—Frightened Horse.—Negligence of Independent Contractor.—*

A railroad company is not liable for an injury to a traveller on a highway, through the fright of his horse, caused by the negligence of the owner of a portable steam-engine in operating it, near the highway, under a contract with the company to pump water out of the way of an excavation which is being constructed by the latter, where he has exclusive control of the engine and of the manner of using it.

From the DeKalb Circuit Court.

C. B. Stuart and W. V. Stuart, for appellant.

C. E. Emanuel, for appellee.

MITCHELL, J.—This action was brought by Farver against the railway company to recover damages for personal injuries alleged to have been sustained by him while lawfully pursu-

111	195
114	532
119	152
120	51
122	364

111	195
124	380

111	195
129	555

111	195
131	308

111	195
151	65
151	66

111	195
153	362

111	195
156	484

111	195
170	591

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ing his way along a public highway in a carriage which was overturned in consequence of his horse having taken fright at a portable steam-engine, alleged to have been negligently placed in or near the highway by the company. The confused state of the record makes it difficult to determine whether the case was tried upon one or both the complaints which are copied into the transcript. Although the one filed last is styled an amended complaint, the subsequent proceedings indicate that both were treated as in the record. The case seems to have been tried upon that theory.

Counsel are at variance, however, as to this matter, but the view we take of the case makes it quite immaterial whether it be one way or the other.

The evidence tends to show, without conflict or substantial dispute, that in September, 1882, the railway company was engaged in constructing a well or reservoir, from which to supply a water station on the line of its road, near Auburn, Indiana. Running water interfered with the work, and it became necessary to cause the accumulating water to be pumped out of the way, so as to prevent it from running into the well or reservoir which was in process of construction. The construction of the well and laying pipes thence to the water station had been committed to the charge of a Mr. Kress, an employee of the railway, who, with a force of men under his control, was engaged in providing means to supply the station with water. Williams, who resided in or near Auburn, was the owner of a small portable steam-engine, which he was accustomed to employ in sawing wood, threshing grain, pumping water, and the like, as opportunity offered. He contracted with Kress, for a stipulated *per diem*, to furnish and operate his engine in pumping, at such times as might be necessary, in order to keep the water from interfering with the work which the latter was constructing. Williams agreed to furnish his engine and personally superintend the running of it, and to provide and pay for such assistance as he needed in keeping the water from obstruct-

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ing the progress of the work. If it became necessary that he should run the engine at night he was to receive extra compensation.

In pursuance of this agreement the latter placed his engine in a vacant lot, some six feet or more outside the line of a public highway which intersected the railway company's line at or near the point where the reservoir was being constructed. So far as appears, he selected the location of the engine, and controlled its operation, as the work he engaged to do required. When the accumulated water was pumped down to a certain level, or when persons were passing on the highway, the engine was stopped, and when the water rose to a certain height the pumping was resumed. While Williams was thus engaged in carrying out his agreement, the plaintiff's horse, in passing along the adjacent highway, took fright at the engine, and became unmanageable. The plaintiff was thrown from his carriage and injured. The question is, whether, under the circumstances, the railway company is liable for the negligence of Williams, assuming that he was negligent in operating his engine so near the public highway.

The rule which controls in cases of this class has become well established, and has more than once been recognized and applied by this court. *Ryan v. Curran*, 64 Ind. 345 (31 Am. R. 123); *Sessengut v. Posey*, 67 Ind. 408 (33 Am. R. 98); *City of Logansport v. Dick*, 70 Ind. 65 (36 Am. R. 166).

Under this rule, where work which does not necessarily create a nuisance, but is in itself harmless and lawful, when carefully conducted, is let by an employer, who merely prescribes the end, to another who undertakes to accomplish the end prescribed, by means which he is to employ at his discretion, the latter is, in respect to the means employed, the master. If, during the progress of the work, a third person sustains injury by the negligent use of the means employed and controlled by the contractor, the employer is not an-

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swerable. The inquiry in such a case is, did the relation of master and servant subsist between the person for whom the work was done, and the person whose negligence occasioned the injury? If, in rendering the service, the person whose negligence caused the injury was in the course of accomplishing a given end for his employer, by means and methods over which the latter had no control, but which were subject to the exclusive control of the person employed, then such person was exercising an independent employment, and the employer is not liable. If, on the other hand, the end to be accomplished was unlawful, or if in and of itself it necessarily resulted in the creation of a nuisance, or in making a place dangerous which the employer was under a peculiar obligation to keep secure, then, regardless of the relation which existed between the employer and the person whose negligent conduct caused the injury, the employer is liable for a breach of duty. *Cuff v. Newark, etc., R. R. Co.*, 35 N. J. Law, 17 (10 Am. R. 205; 9 A. L. R., N. S., 541); *Smith v. Simmons*, 103 Pa. St. 32 (49 Am. R. 113); *Harrison v. Collins*, 86 Pa. St. 153 (27 Am. R. 699); *School District, etc., v. Fuess*, 98 Pa. St. 600 (42 Am. R. 627); *Hunt v. Pennsylvania R. R. Co.*, 51 Pa. St. 475; *Callanan v. Burlington, etc., R. R. Co.*, 23 Iowa, 562; *Eaton v. European, etc., R. W. Co.*, 59 Maine, 520 (8 Am. R. 430); *De Forrest v. Wright*, 2 Mich. 368; *Moore v. Sanborne*, 2 Mich. 519; *Corbin v. American Mills*, 27 Conn. 274; *Bailey v. Troy, etc., R. R. Co.*, 57 Vt. 252 (52 Am. R. 129); Wood Master and Servant, section 313, *et passim*; Cooley Torts, 548. The application of the foregoing principles to the facts in hand leads to the conclusion that the appellant was not liable.

The work contracted to be done was not in itself unlawful, nor was it necessarily a nuisance to operate a portable steam-engine in a careful manner in close proximity to a public highway. Injury could only result from its negligent use. It would not do to say that the operation of a

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portable engine, near a public highway, necessarily resulted in creating a nuisance, when it is according to daily experience, during certain seasons of the year, to see steam threshing-machines in operation on every hand, and often necessarily close to public highways. Road engines propelled by steam, and portable engines operated by steam, have become familiar in every agricultural community. To declare that their use near, or their passage over, a public highway constituted a nuisance, would be practically to prohibit their use in the manner in which they are customarily employed and moved from place to place. It must be supposed that horses of ordinary gentleness have become so familiar with these objects as to be safe, when under careful guidance. *Piollet v. Simmers*, 106 Pa. St. 95 (51 Am. R. 496); *Gilbert v. Flint, etc., R. W. Co.*, 51 Mich. 488 (47 Am. R. 592); *Macomber v. Nichols*, 34 Mich. 212 (22 Am. R. 522).

Now as to the relation between the railway company and Williams, keeping in view the rule that where an employee is exercising an independent employment, and is not under the control and direction of the employer, the latter is not responsible for the negligence or misdoings of the former. *King v. New York Central, etc., R. R. Co.*, 66 N. Y. 181 (23 Am. R. 37). It is nowhere denied but that Williams was employed to furnish and superintend the running of his engine, to the end that the water might be pumped out of the way, so as to admit of the prosecution of the work in which the railway company was engaged. In respect to the engine, and the manner of operating it, he was the sole master, and had the right to employ whomsoever he pleased to assist him. Neither the railway company nor any of its employees had the right to run the engine, or to interfere in the manner of its running, or to direct its owner how or when it should be run. The only right the company had in respect to the matter was to require Williams to accomplish the end of keeping the water out of the way of its workmen. In respect to his engine, and its control, and his liability for its negligent use, the lat-

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ter was as much an independent contractor when pumping water for the railway company as when sawing wood or threshing wheat for persons in the neighborhood. His relation to the railway company, while executing his contract for it, was precisely the same as to others, while executing work for them with his engine under contracts. It would be a startling proposition to affirm that every person who employs the owner of an engine and machinery to saw wood or thresh his crop would be liable to any person who might be hurt through the negligence of the operator or his assistants, although the employer had no control over the machinery and no immediate direction over those engaged in its operation.

The conclusion thus reached upon the facts renders it unnecessary that we should examine in detail all the various questions discussed in the briefs. The evidence does not sustain the finding. The court erred in overruling the motion for a new trial.

Judgment reversed, with costs.

Filed May 26, 1887.

111	200
111	575
123	103
111	200
150	452
111	200
155	631

No. 12,853.

BEVIER ET AL. v. KAHN.

NOTICE.—*Summons.— When not Necessary on Cross-Complaint.*—It is not necessary to issue a summons on a cross-complaint as against the defendants to the original complaint, where the latter discloses the character of the claim of the cross-complainants, and fairly informs the defendants that such claim will be adjudicated, as it is their duty to take notice without further process of all the proceedings in the cause.

From the Steuben Circuit Court.

J. A. Woodhull and W. M. Brown, for appellants.

C. A. O. McClellan and D. A. Garwood, for appellee.

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ELLIOTT, J.—The appellee claims title to the land in controversy under a sheriff's sale made upon a decree of foreclosure, and sought by this suit to have his title quieted.

In the complaint filed by the plaintiffs in the foreclosure suit the mortgage sought to be foreclosed was set forth, and it was averred that it was executed by the appellants to secure the payment of two promissory notes; that one of the notes was endorsed to the plaintiffs in that suit by the mortgagee; that the other note was endorsed to Crane, Duncan & Lydecker, and that they "claim thereby an interest in said described land adverse to plaintiffs."

Crane, Duncan & Lydecker filed a cross-complaint setting forth the note assigned to them and asking that the mortgage be foreclosed for their benefit, and that judgment be rendered in their favor. It does not appear that process was issued on the cross-complaint, nor that an appearance was entered by any of the parties except the plaintiffs, but it does appear that by agreement of the parties the cause was submitted to the court for trial, and that a decree was entered declaring the lien of Crane, Duncan & Lydecker to be the prior one and awarding them judgment.

The contention of the appellants is, that there was no service of process on the cross-complaint, nor any appearance, and that the decree in favor of the cross-complainants was void. This contention can not prevail. Our judgment is, that the complaint disclosed the character of the claim of the cross-complainants and fairly informed the appellants that the claim would be adjudicated, and that, for this reason, no process was necessary.

In *Pattison v. Vaughan*, 40 Ind. 253, the allegation as to the nature of the claim of one of the defendants was very similar to that contained in the complaint before us, and it was held that it was not necessary to issue a summons on the cross-complaint, the court saying: "We think that as to matters contained in the original complaint, if not in all cases, the defendants to the original complaint, when served

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with process thereon, as well as the plaintiff therein, must be regarded as in court for all the purposes of the action, whether the matter in controversy arise upon the original complaint, or upon the answer or cross-complaint." The same general doctrine is maintained in *Lewis v. Bortsfeld*, 75 Ind. 390, *Nofsinger v. Reynolds*, 52 Ind. 218, 224, and *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380, 385. In *Joyce v. Whitney*, 57 Ind. 550, there is a statement that, "In so far as the cases of *Pattison v. Vaughan*, 40 Ind. 253, and *Fentriss v. State, ex rel., etc.*, 44 Ind. 271, appear to be in conflict with this decision, they are overruled;" but it will be found on investigation that the authority of *Pattison v. Vaughan, supra*, so far as it bears upon the question here presented, is not impaired. There is, indeed, no real conflict between the decision in *Pattison v. Vaughan, supra*, and that in *Joyce v. Whitney, supra*, although there may be as to some of the language employed in expressing the opinions.

In the case before us, the complaint showed that the two notes were secured by the same mortgage; that they had been transferred to different parties; that there was a question as to the priority; that the parties were brought into court to settle all such questions; and this was enough to fairly and reasonably apprise the appellants that they were called into a case which could not be determined without the filing of a cross-complaint. It was, therefore, their duty to take notice, without further process, of all the proceedings in the cause.

Judgment affirmed.

Filed May 28, 1887.

The Pennsylvania Company v. Nations.

No. 12,770.

THE PENNSYLVANIA COMPANY v. NATIONS.

EVIDENCE.—*Declarations of Agent.*—Declarations of a time-keeper, within the line of his employment, are admissible in evidence against his principal.

NEW TRIAL.—*Newly Discovered Evidence.*—*Cumulative.*—*Impeaching.*—A new trial will not be granted on the ground of newly discovered evidence where the latter is merely cumulative, or tends to impeach evidence previously given, nor where a sufficient excuse is not shown for failing to produce the evidence at the first trial.

From the Owen Circuit Court.
S. O. Pickens, for appellant.
J. C. Robinson and I. H. Fowler, for appellee.

MITCHELL, J.—Calvin F. Nations, George W. and Isaac A. Bledsoe sued the Pennsylvania Company to recover upon an alleged contract for the use of two portable steam-engines and for the services of two engineers. The plaintiffs claimed that the company engaged the engines and engineers in its service at the agreed price of ten dollars per day, and that the engines and engineers had served it for the period of forty-five days, for which service a specified sum remained due to Nations individually, and another sum to Bledsoe & Bledsoe. Nations recovered sixty dollars. As to the Bledsoes, the finding was for the company.

There was a dispute as to the time the engines were employed. The company claimed that it contracted with the parties jointly, or, rather, that it had contracted with Bledsoe for both engines, and that it had paid him a gross sum sufficient to liquidate its obligation under the contract.

What purports to be a bill of exceptions recites that one of the Bledsoes, while testifying as a witness, was asked to state what a Mr. Yockey, the company's foreman and time-keeper, told him as to the number of days the plaintiffs' engines had been engaged in the company's service, and the amount due them under the agreement. Over objection, the

111	203
117	371
111	203
126	365
111	203
143	688
111	203
151	679
111	203
153	132
111	203
162	300

The Pennsylvania Company v. Nations.

witness was permitted to answer that Yockey told him that the engines had been employed a given number of days, and that a given amount remained due as he understood the contract.

It is said that the company can not be bound by the declarations of its agent.

The bill of exceptions upon which the question is made is a mere recital by the court, in its own language, in narrative form, of what purports to be the substance of the questions and answers objected to, and the rulings thereon.

This method of presenting a question upon evidence is not approved. We are unable to ascertain from the bill how, or in what connection, or the circumstances under which, the conversation between Yockey and Bledsoe was had. For all that appears, Bledsoe may have been directed by the company to apply to its time-keeper to ascertain the time his engines had been employed, and the amount appearing to be due. If Yockey was the company's time-keeper, as we infer he was, appointed and authorized to keep the plaintiffs' time and the state of their accounts, it must be implied that he was authorized to give them information on that subject. That was in the line of his employment, and a communication from him to the plaintiffs, or either of them, upon that subject, while engaged about that business, was, in effect, a communication from the principal.

What the time-keeper said about his understanding of the contract may not have been competent. If that part of the conversation had been objected to separately, or if a separate motion had been made to strike that part of the answer out, the question might require further consideration. So much of the conversation as related to the time the engines had been employed, and what was said by the time-keeper concerning making out the time and pay-rolls, was not, so far as can be determined from the bill of exceptions, objectionable.

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Some other questions concerning the overruling of objections to the admission of evidence on the plaintiffs' behalf are discussed. We have considered these questions, and are of opinion that the court committed no error in the rulings complained of. The method in which the questions are presented in the bill of exceptions, already remarked upon, is such as not to require us to state or consider them more fully.

The only remaining question relates to the refusal of the court to grant a new trial on account of newly discovered evidence.

The evidence which was claimed to have been newly discovered consisted of a letter written by one of the Bledsoes to Mr. Spence, who negotiated the contract on behalf of the company with the plaintiffs. The letter was written pending the negotiations for the hiring, and the claim is that it strongly corroborates the testimony of Mr. Spence, which was to the effect that he contracted with the Bledsoes for two engines, and not that the Bledsoes should furnish one and Nations one, as the plaintiffs below claimed the fact to be.

There are two sufficient reasons why the ruling of the court can not be disturbed. One is, the evidence, if admitted, would simply be cumulative upon a subject concerning which the plaintiffs testified one way and witnesses for the defendant testified the other. The letter might afford some circumstantial corroboration of the defendant's witnesses; it might also tend in some slight degree to impeach the evidence of the writer of the letter; but a new trial will not be granted where the newly discovered evidence is merely cumulative, or tends only to impeach evidence previously given. *Marshall v. Mathers*, 103 Ind. 458; *DeHart v. Aper*, 107 Ind. 460; *Sutherlin v. State*, 108 Ind. 389.

The other reason for approving the ruling of the court is, there is no sufficient excuse shown for not having produced the letter, or for not having made any effort to prove its contents, at the first trial. That the witness had forgotten, or did not suppose that he had preserved, the letter until he accidentally

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discovered it after the trial, was no excuse for not having looked for it before.

Judgment affirmed, with costs.

Filed May 28, 1887.

No. 13,641.

ROWE, TRUSTEE, v. RAND, RECEIVER.

PRINCIPAL AND AGENT.—*Trustee.*—*Style of Bank Account.*—One who is put in possession of property by joint owners, with instructions to sell it upon the best available terms, at his discretion, is an agent, and not a trustee, and his character is not changed by styling himself "trustee," at the suggestion of one of his principals, a banking company, in making deposits with the latter of the proceeds of sales, to distinguish the account from another kept by him as agent.

SAME.—*Joint Principals.*—*Severance of Interests.*—*Revocation of Agency.*—*Banks.*—*Mutual Release of Claims.*—Where two banks, as principals, appoint an agent to take charge of a matter in which they are jointly interested, who deposits the joint funds in one of the banks, and a severance of the joint interest afterwards occurs, and in a compromise of differences each releases all claims against the other, the agency is thereby revoked, and a claim against the bank holding the deposit by the other principal for a share therein is discharged.

SAME.—*Right of Agent to Maintain Action.*—The right of an agent to bring an action in his own name in certain cases is subordinate to the rights of the principal, who may bring suit himself, and thus suspend or extinguish the right of the agent, unless in particular cases where the latter has a lien or some other vested right.

RELEASE.—*Construction of.*—*Extrinsic Evidence.*—To enable a court to construe a release from the stand-point occupied by the parties, extrinsic evidence is admissible to explain the circumstances under which it was executed, and the nature of the transaction to which it was designed to apply. The particular purpose for which it was executed ought to be kept in view, and where only general words are used they are to be construed most strongly against the party executing the release.

From the Marion Superior Court.

H. J. Milligan, for appellant.

F. Winter and *J. M. Winters*, for appellee.

Rowe, Trustee, v. Rand, Receiver.

NIBLACK, J.—During the year 1879, the First National Bank of Indianapolis, since distinguished as No. 55 of that name, and the Indiana Banking Company, the name assumed by a firm of private bankers, obtained judgments of foreclosure against the Shaw Carriage Company upon chattel mortgages executed to them respectively upon carriages, buggies and other vehicles, and procured the appointment of William Rowe, the appellant in this cause, as receiver to take charge of the business of that company at a stipulated compensation per week. At a sheriff's sale of a part of the mortgaged property, held in May, 1880, the bank and banking company jointly bid off property to the amount of \$6,134.50, and at a subsequent sale, in July following, bid off additional property to the value of \$1,400. The bank and banking company left the entire amount of property so bid off by them in the possession of Rowe, with instructions to him to sell it upon the best available terms, at his discretion, with the understanding that the net proceeds were to be divided between those institutions in the proportion which \$4,062.39 sustains to \$3,512.11. As Rowe realized money from time to time from the sale of the property thus left with him, he, with the knowledge and consent, and at the request, of both institutions, deposited the amount to his own credit, under the name of "William Rowe, trustee," in the banking company's bank. The deposits thus made by him eventually amounted to the aggregate sum of \$7,074.58, which did not include the entire proceeds of the property. The first deposit made, as stated by Rowe, was cash realized from a sale of a buggy soon after he took charge of the property. At that time he had an account with the banking company in his individual name, another in his name as "agent," and still another as "receiver." He was, in consequence, advised by a member of that company to place the money to his credit as "trustee," which he did, and continued to do. On this subject, Rowe, as a witness, said: "As I was really an agent in this case, but had another account in the bank,

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separate and distinct from this, under that name, it was necessary to call it something else, and it was, therefore, called 'William Rowe, trustee.' " Notes for some of the property afterwards sold by him were also taken by him in his name as "trustee." On the 10th day of August, 1883, the banking company suspended payment and closed its doors against its creditors, and, in a few days thereafter, by proper proceedings in the court below, Frederick Rand, the appellee here, was appointed a receiver to close up its business. In the meantime the First National Bank of Indianapolis, known as No. 2556 of that name, had been organized as the successor of the national bank hereinabove named, and had succeeded to the available assets and general business of the old bank. At the time of the failure of the banking company, it owed these two national bank organizations the admitted sum of about \$168,000, and those organizations made a further claim against it in the sum of \$56,000, which was contested. The business and general management of the three banking organizations had become so intermingled and so involved that the further continuance in business of the then newly organized First National Bank, above referred to, required an immediate settlement with and severance from the banking company.

Representatives of the three organizations accordingly met on the 10th day of August, 1883, the day on which the banking company closed its doors, for the purpose of making a settlement and of promoting the proposed severance. After the interchange and mutual acceptance of certain propositions, and the consequent transfer of certain moneys, funds and property, the following agreement in writing was entered into, the said banking company acting through F. A. W. Davis, its cashier:

" INDIANAPOLIS, IND., Aug. 10th, 1883.

" This agreement, made in duplicate by and between the 'First National Banks,' Nos. 55 and 2556, and the 'Indiana Banking Company,' certifies that the said parties have ad-

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justed and compromised their differences, and said 'Indiana Banking Company' holds no claim against either of said banks, nor does either of said banks hold any claim whatever against said 'Indiana Banking Company;' but this is not to be construed as a release or discharge of any unpaid paper held by said First National Banks, No. 2556 and No. 55, against any individual or individuals who may be members of the 'Indiana Banking Company.'

"F. A. W. DAVIS, Cashier.

"The First National Banks of Indianapolis, No. 55 and No. 2556, by A. D. LYNCH, President."

On the 27th day of June, 1885, Rowe, designating himself as "trustee," and claiming to be still the owner of and entitled to control the money so deposited by him as "trustee" with the banking company, filed his intervening petition in the court below against Rand as receiver of that company, praying that an allowance might be made in his favor for the amount deposited by him as stated. Rand answered: *First*. In denial. *Second*. Payment. *Third*. Setting up the agreement above set out in release and discharge of the claim so presented.

Issue being joined, there was a trial at special term, and a finding and judgment in favor of Rand as such receiver of the banking company, and an affirmance of the judgment at general term.

The appellant maintains that upon the evidence the finding and judgment ought to have been in his favor, and that, consequently, the court below, at general term, erred in affirming the judgment so rendered against him at special term.

A trustee is one to whom an estate has been conveyed in trust, and, consequently, the holding of property in trust constitutes a person a trustee. An agent is one who acts for, or in place of, another, denominated the principal, in virtue of power or authority conferred by the latter, to whom

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an account must be rendered. In the case of an ordinary agency for the sale or disposition of property, the title to the property, as well as to the proceeds, remains in the principal. Such an agency may be revoked at any time, in the discretion of the principal. It may, also, be in like manner terminated by the renunciation of the agent, he being liable only for the damages which may result to the principal. An agency may also be, and is, revoked by operation of law in certain cases, among which are the bankruptcy of the principal, the extinction of the subject-matter of the agency, the loss of the principal's power over such subject-matter, or the complete execution of the business for which the agency was created; also, where the changed condition becomes such as to produce an incapacity in either party to proceed with the business of the agency. Where a power or authority to act as agents is conferred on two persons, the death of one of them terminates the agency. So, where two persons are jointly appointed agents to take charge of a particular business for a specified term or purpose, and one of them becomes incapacitated before the term is completed or the purpose is accomplished, the other can not proceed alone without the consent of the principal, and hence the agency is thereby in effect revoked. Abbott's and Bouvier's Law Dictionaries, titles "Agent" and "Agency;" 1 Wait Actions and Defences, 289; 1 Parsons Contracts, 39, *et seq.*; Story Agency, sections 38, 42, 474, 499.

The inevitable inference from these legal propositions is, that when two principals jointly appoint an agent to take charge of some matter in which they are jointly interested, and a severance of their joint interest afterwards occurs, the severance revokes the agency.

An agent may sue in his own name: *First.* When the contract is in writing, and is expressly made with him, although he may have been known to act as agent. *Secondly.* When the agent is the only known or ostensible principal, and is, therefore, in contemplation of law, the real contracting party.

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Thirdly. When, by the usage of trade, he is authorized to act as owner, or as a principal contracting party, notwithstanding his well known position as agent only. But this right of an agent to bring an action, in certain cases, in his own name is subordinate to the rights of the principal, who may, unless in particular cases, where the agent has a lien or some other vested right, bring suit himself, and thus suspend or extinguish the right of the agent.

Applying the general principles thus announced to the facts hereinabove stated, our conclusions are, that Rowe became an agent only, and hence not a trustee, for the sale of the property left with him by the banks; that he acquired no lien either upon the property or its proceeds which would have prevented the national banks, or either one of them, as the situation might have authorized at the time, from revoking Rowe's authority as their agent, and demanding an accounting from the banking company as to the money deposited with it by him, or from demanding such an accounting without revoking Rowe's agency; that, consequently, the money so deposited constituted a fund upon which the national banks might have based a claim against the banking company when the agreement was mutually entered into on the 10th day of August, 1883, and that, if, in fact, all claim against that fund was released by the agreement of that date, the agency of Rowe in all matters concerning the fund was thereby revoked, leaving him in a position to demand only an accounting for his services and expenses.

A release ought to be construed from the stand-point which the parties occupied at the time of its execution.

To enable a court to so construe a release, extrinsic evidence is admissible to explain the circumstances under which it was executed, and the nature of the transaction to which it was designed to apply, without adding to, or subtracting anything from, the words used by the parties to the instrument. 1 Greenl. Ev., section 277; *Reed v. Insurance Co.*, 95 U. S. 23; 7 Wait Actions and Defences, 464.

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The particular purpose for which a release was executed ought always to be kept in view, and where only general words are used they are to be construed most strongly against the party executing the release. *Seymour v. Butler*, 8 Iowa, 304; *Rich v. Lord*, 18 Pickering, 322; *Fazakerly v. McKnight*, 88 Eng. Com. Law, 794; *Solly v. Forbes*, 4 Moore, 448; *Lyall v. Edwards*, 6 Hurlstone & Norman, 336; *Jackson v. Stackhouse*, 1 Cowen, 122.

The evidence tended to prove that the list of claims formally presented by the national banks against the banking company did not embrace any part of the money deposited and since demanded by Rowe as trustee, but it tended further to show that the purpose the parties had in view, in ultimately entering into the agreement hereinabove set out, was to mutually release and discharge each other from all claims and demands of every nature and kind, and to complete, in this way, an entire severance of interests between the national banks on the one side and the banking company on the other.

The finding of the court below at special term was, consequently, sustained by the evidence.

The judgment at general term is affirmed, with costs.

Filed June 14, 1887.

No. 12,844.

THE PENNSYLVANIA COMPANY v. WHITCOMB, ADMINISTRATOR.

MASTER AND SERVANT.—Duty of Employer to Provide Safe Machinery.—It is the duty of the employer to provide the employee with a safe working place and with safe machinery and appliances, and in discharging this duty he is required to exercise ordinary care and skill.

SAME.—Delegation of Duty.—Responsibility of Master.—The duty to provide employees with safe machinery and appliances can not be so delegated by the master as to relieve him from responsibility. The agent to

111	212
114	32
115	508
117	266
117	521
117	594
118	583
121	126
111	212
124	97
127	51
111	212
130	325
130	349
111	212
131	535
132	340
132	447
111	212
134	158
136	467
111	212
138	22
111	212
146	218
111	212
151	301
152	596
111	212
159	667

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whom it is entrusted, whatever his rank may be, acts as the master in discharging it.

SAME.—Rules Governing Employees.—Contract of Service.—An employer may adopt reasonable rules for the government of his employees, and when brought to the knowledge of the latter, who thereafter continue in the master's service, the rules and an implied undertaking to obey them enter into the contract of service.

SAME.—Railroad.—Rule that Brakemen Shall Use Coupling-Sticks.—Violation of Requirement.—Liability of Company.—Where a rule of a railroad company requires that cars shall be coupled by the use of coupling-sticks, and this rule is brought to the knowledge of one employed as brakeman, and assented to by him, it constitutes a part of his contract of service, and for an injury received by him in endeavoring to make a coupling by hand, the company is not liable, unless it be shown that the act could not have been safely performed even by the use of the appliance provided, or that obedience to the rule was not practicable under the circumstances of the particular case.

From the Shelby Circuit Court.

S. Stansifer, for appellant.

T. B. Adams, L. T. Michener and G. M. Wright, for appellee.

ELLIOTT, J.—Millard Spurlin was in the service of the appellant as a brakeman, and was killed while engaged in the line of his duty, in coupling cars.

The complaint of the appellee, who sues as the administrator of Spurlin, alleges, among other things, that, "The defendant carelessly, negligently and contrary to its duty, had in its use and control on said railway at Lewis Creek Station, Shelby county, Indiana, two freight cars which were unsafe and unsuitable in their construction in the manner following, to wit: That through the heavy beam across one of said cars there projected a large iron rod for the distance of, to wit, four inches beyond said beam and about, to wit, two feet from the draw-bar on said beam, and that on the other of said cars there projected a large cast-iron stirrup or post socket for the distance of, to wit, six inches from the heavy beam across the end of said car, the stirrup or socket being bolted to said beam about, to wit, two feet from the draw-bar thereon; and that said cars were so unsafely and insecurely constructed

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that when they were being coupled together the said iron bolt and said iron stirrup or socket were almost opposite each other and with no more of space between them than, to wit, three inches. And the plaintiff says that in order to couple said cars together it was necessary for the brakeman performing said duty to go between said car in which was said iron bolt and the other car, and insert the link and bolt at their proper places in the draw-bars, he necessarily standing at the time at such distance from the dead-woods aforesaid as to be between said bolt and said stirrup or socket on the other car. And the plaintiff says that, on the day and at said station, while the freight train on which the said decedent was employed was engaged in switching and moving and shifting freight cars, the said decedent, in the performance of his duty, went between the two cars above described, to couple them together, one of said cars standing still, while the other was being pushed along the track by the engine toward the first named car, the decedent necessarily standing at the time at such a distance from the dead-woods aforesaid as to be between said bolt and the said stirrup or socket on the other car; that while so standing there, engaged in coupling said cars together, the said cars were pushed together by said engine, and the decedent was caught between said bolt and said stirrup or socket, and his body was so crushed, pressed and injured thereby that he died in said county in fifteen minutes thereafter as the result of said injuries occasioned as aforesaid; and that if said cars had been safely, suitably and properly constructed, said injuries and death would not have occurred. The plaintiff also says that said injuries were received without any fault or negligence on the part of said decedent."

The appellant answered in several paragraphs, but we regard the controlling question the same upon all of these paragraphs, for the sufficiency of all of them depends upon what is alleged to be a contract entered into between the appellant and the appellee's intestate. That contract is averred

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to be evidenced by a circular issued by the appellant and assented to by the intestate. Omitting immaterial and formal parts, the circular and the alleged agreement of the decedent read as follows:

“Coupling cars by hand is dangerous and unnecessary. This work can be as effectually done by the use of a coupling-stick, which will be supplied to employees by yard-masters at Louisville, Jeffersonville, Columbus, Madison and Indianapolis. From this date the company will not assume any liability or pay any expenses incurred by employees on account of injuries received in coupling cars.

“E. W. McKenna, Superintendent.

“I hereby acknowledge the receipt of a copy of the above circular. M. SPURLIN.”

It is averred in the answer that during all the time that Spurlin was in the appellant's service a full supply of coupling-sticks was kept with the yard-masters at Louisville, Jeffersonville, Columbus, Madison and Indianapolis, “and that the said Millard Spurlin, although he might and could readily have supplied himself with one of the said coupling-sticks, at any one of said places or from the caboose of said train, where there was a supply, and of which he had knowledge, failed to do so, and attempted to and made said coupling, whereby he was injured as complained of, by hand. It is denied that decedent was in any manner obligated, or that it was his duty, to make said coupling other than by the use of a coupling-stick, and it is averred that had he used one of said coupling-sticks, it would not have been necessary for him to go or stand between said bolt and said stirrup or socket.”

It is undoubtedly the duty of the employer to provide the employee with a safe working place and with safe machinery and appliances. The employer is not bound to exercise the highest degree of skill and care in discharging this duty, but he is required to exercise ordinary care and skill. *Krueger v. Louisville, etc., R. W. Co., ante*, p. 51; *Bradbury v. Good-*

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win, 108 Ind. 286; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Baltimore, etc., R. R. Co., v. Rowan*, 104 Ind. 88; *Indiana Car Co. v. Parker*, 100 Ind. 181, and cases cited.

This duty is one which the law enjoins upon the master, and it is one which can not be so delegated as to relieve him from responsibility. The agent to whom it is entrusted, whatever his rank may be, acts as the master in discharging it. He is in the master's place. *Krueger v. Louisville, etc., R. W. Co., supra*, and cases cited; *Indiana Car Co. v. Parker, supra*, and cases cited; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642 (33 Alb. L. J. 288).

In the case last cited the authorities are reviewed, and the court said: "This duty he can not delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability."

These principles, so confidently relied upon by the appellee, by no means solve the questions presented by these answers. Duties rest upon the employee as well as upon the employer. Obligations are imposed upon the one by law as well as upon the other. One of the obligations imposed upon one who enters another's employment is, that he shall assume the risks and dangers incident to that employment which are known to him, or which by the exercise of reasonable care he might have known. No one is bound to remain in a service which he is informed is dangerous, and if an employee does voluntarily continue in the master's service after notice of its dangers he assumes all risks arising from the known dangers. *Umback v. Lake Shore, etc., R. W. Co.*, 83 Ind. 191; *Louisville, etc., R. R. Co. v. Orr*, 84 Ind. 50; *Bradbury v. Goodwin, supra*; *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1; *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75; *Hatt v. Nay*, 10 N. E. Rep. 807.

The risks which the employee assumes are, however, such as are incident to his service, and such as arise in cases where

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ordinarily safe machinery and appliances are provided. If machinery of an unusual and more dangerous character is provided, and the employee has no notice of the danger, then he does not assume the risk attendant upon its use. *Baltimore, etc., R. R. Co. v. Rowan, supra.*

If the deceased continued in the master's service after the danger of coupling cars was made known to him as incidental to his service, he voluntarily assumed the risk, and it is very doubtful whether the complaint is good. This we say because it does not aver that the cars were not ordinary ones and the danger from coupling them an unusual one. But as no assault is made upon the complaint, we do not pass upon its sufficiency. It is necessary, however, to speak of the character of the complaint, for the question is, whether the answer is good to the complaint as drawn, and not whether it would be good in any case. It is difficult, we may further add, to perceive how this action can be maintained without showing that the danger was not incident to the service, or the cars of an unusual kind, but on this phase of the subject we express no direct opinion.

The circular warns the employees that the coupling of all cars by hand is dangerous. Its warning is not confined to cars of a particular class, but it extends to all kinds and all classes. Nor is it simply a warning notice. It is much more. It is a warning and a direction. It instructs all employees to couple all cars with a coupling-stick, and forbids the coupling by hand. This is its legal meaning and effect. By clear and necessary implication, it forbids the coupling of cars by hand and commands that it be always done by the instruments provided for that purpose. We very much doubt whether an employee who remains in service after such a warning, and who disobeys the instructions received from his employer, can recover without, at least, affirmatively showing that obedience would have caused greater danger than disobedience, or that obedience was not practicable under the circumstances of the particular case.

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Buzzell v. Laconia Man'f'g Co., 48 Maine, 113; *Frazier v. Pennsylvania R. R. Co.*, 38 Pa. St. 104; *Mad River, etc., R. R. Co. v. Barber*, 5 Ohio St. 541; *Senior v. Ward*, 1 El. & El. 385.

It is difficult to conceive any principle upon which an employer can be held liable to an employee who disobeys instructions without cause or excuse. Analogous cases seem to declare against the right of recovery; for, to mention one of many, even a passenger who violates, without excuse, the rules of a carrier, can not maintain an action. We are strongly inclined to the opinion that where there is a disobedience of instructions there can be no recovery by the employee, unless he shows that obedience would have augmented the danger, or that it would have been impracticable. But we need not decide this question, for the answers carry us beyond it. While it is not necessary to decide the questions we have just adverted to, it is, nevertheless, proper to speak of them, since what we have said is logically connected with what follows upon the ruling question in the case.

We regard the circular and the acts performed under it as constituting a contract. By formally acknowledging the receipt of the circular and continuing in the service of the company, the decedent made its terms part of the contract with his employer. It was in the nature of a statement to him of the terms upon which the company would continue him in its service. It asserts, if not in express terms, by clear implication that cars must not be coupled by hand, that they must be coupled by the use of the appliances provided, and that if they are coupled by hand the company will not be liable for injuries received by its employees. These are the terms of the contract of hiring. There are many cases in the books holding that the rules adopted by the employer and made known to the employee enter into and form part of the contract. *Payne v. Western, etc., R. R. Co.*, 13 Lea (Tenn.) 507 (49 Am. R. 666); *Carew v. Rutherford*, 106 Mass. 1 (8 Am. R. 287); *Heywood v. Tillson*, 75 Maine, 225

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(46 Am. R. 373); *Collins v. New England Iron Co.*, 115 Mass. 23; *Bradley v. Salmon Falls, etc., Co.*, 30 N. H. 487.

It is, indeed, not simply the right of the employer to adopt proper rules, but it is his duty to do so. *Abel v. President, etc.*, 103 N. Y. 581 (57 Am. R. 773); *Vose v. Lancashire, etc., R. W. Co.*, 2 H. & N. 728; *Haynes v. East Tennessee, etc., R. R.*, 3 Cold. 222.

Even in the case of a passenger, the rule is that the regulations of the carrier enter, to some extent at least, into the contract of the parties. *Chicago, etc., R. R. Co. v. Bills*, 104 Ind. 13; *Western Union Tel. Co. v. Harding*, 103 Ind. 505, 511; *Ohio, etc., R. W. Co. v. Applewhite*, 52 Ind. 540; *Pittsburgh, etc., R. W. Co. v. Nuzum*, 50 Ind. 141 (19 Am. R. 703).

It is obvious that a business requiring the employment of many persons could not be properly conducted without a system of rules, and it is equally clear that the rules would be of little force unless they formed a part of the contract between the employer and employee. If they did not constitute an element of the contract, they would protect neither the master nor the servant, and unless the master may prescribe rules and exact obedience to them, he can not control his own business. It seems quite clear on principle that the employer may adopt reasonable rules, and that when brought to the knowledge of the employee they constitute an element of the contract. The decided cases recognize this general rule, although there seems to be some difference in the course pursued in giving it practical effect. *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; *Sprong v. Boston, etc., R. R. Co.*, 58 N. Y. 56; *Memphis, etc., R. R. Co. v. Thomas*, 51 Miss. 637; *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18.

Where a person enters the service of another, knowing the rules prescribed by his employer, he impliedly undertakes to obey those rules, and this undertaking enters into his contract. An undertaking implied by law is as much a part of the contract as its express stipulations. *Long v.*

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Straus, 107 Ind. 94. It needs but little argument to prove that one who enters a service governed by rules which are known to him, contracts to perform service under those rules. It is evident that this must be so, or else the cases which hold that it is a breach of duty on the part of the master not to make rules, as well as those which hold that it is a breach of duty for the employee to violate them, are not well decided, and that they are not correctly decided can not be granted; so that the conclusion must be, that the rules form an element of the contract of service. If regulations are not part of the contract, then they create no duty on the part of the master and impose no obligations on the employee. If there is no duty there is no liability, and yet, as we have seen, the cases all agree that there is a liability where there is a breach of known rules.

It can not be possible that a servant may discharge his duties as he sees fit regardless of the rules prescribed by the master. To affirm that he can would be to strip the master of all authority over his own business, and leave him powerless to instruct or command. If the master has authority, and gives it expression in rules duly made known to his employees, they, by accepting service, agree, as part of their contract, that they will obey those rules. If this be not so, then there can be no systematic government of the master's business, nor any definite rule for determining the rights and duties of the parties where the relation of master and servant exists.

There is some conflict in the authorities upon the question whether a contract exonerating the employer from liability for negligence is valid. *Roesner v. Hermann*, 8 Fed. Rep. 782; *Western, etc., R. R. Co. v. Bishop*, 50 Ga. 465. But we do not enter this field of conflict. It is not necessary for us to do so, because we need go no further than determine that a master may lawfully contract that his employees shall use certain designated appliances in performing the duties of their services. Our decision is, that the contract before us

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is a valid one so far as it affects the case made by the complaint, for we regard it as an undertaking that the employees shall use a designated appliance. It is not, so far as concerns the question now before us, a contract that the employer will in no event be liable, but it is an agreement that the employer will not be liable unless the appliances provided by him are used as he directs.

The contract applies to the coupling of all cars, and the employee agrees to use the coupling-stick in all cases. The employer had the right, therefore, to assume that the employee would not undertake to couple cars, no matter what their kind or class, without making use of the coupling-stick. If a coupling could have been safely made with the coupling-stick, then there is no liability, whatever may have been the kind of cars the employee was required to connect. The employer was not bound to do more than provide such cars as might have been safely connected by the use of the appliance which the employee was directed to use. There can be no liability, at least, until it is made to appear that had the coupling-stick been used, still the duty of coupling could not have been safely performed, or that, under the circumstances, it was not practicable to use the appliance selected by the employer.

The presumption is, that the master has performed his duty. *Hard v. Vermont, etc., R. R. Co.*, 32 Vt. 473; *Wood Master and Servant*, 708; 3 Wood Railway Law, 1468. This presumption the employee must overcome, for it stands, until overthrown, as a *prima facie* case. *Nave v. Flack*, 90 Ind. 205 (46 Am. R. 205). It must, therefore, be held that the appellant discharged its duty unless the contrary has been affirmatively shown, and this leads to the conclusion that the presumption is, in the absence of countervailing facts, that the appellant did provide such cars as might have been safely coupled by the use of the coupling-stick. It was incumbent on the appellee to overthrow this presumption, for until overthrown it stands in his way to a recovery.

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Where the contract requires that the employee shall use appliances designated by the master, and he fails to do so, the master can not be deemed in fault unless something more is made to appear. Nor can the master be deemed in fault for providing cars that can not be safely coupled by hand when he has required his employees not to couple by hand in any case, but to use the coupling-stick in every case. Where, as here, the agreement is that the employee will couple cars in a designated manner, the master is bound to use reasonable care to provide cars that may be safely coupled in that manner, but is not bound to furnish cars that can be safely coupled in the manner forbidden by the contract of service.

The utmost that can be conceded to the complaint in this case, if, indeed, so much can be conceded, is, that it shows an actionable breach of duty in failing to provide cars that could be coupled by hand without injury to the brakeman. The complaint, conceding its sufficiency, is sufficient only because it shows a negligent breach of duty in failing to furnish cars that might be safely coupled by hand. The theory of the complaint is, that it was proper to couple by hand; that the appellant did not provide such cars as could be safely coupled in that manner, therefore, it is liable. The complaint makes a *prima facie* case, if it makes one at all, only upon the hypothesis that it was the appellant's duty to provide cars that might with safety be coupled by hand, and if this hypothesis is destroyed the *prima facie* case fails. The answer does destroy this *prima facie* case, because it shows that it was a breach of duty by the employee to undertake to couple the cars by hand, and because it shows that the obligation resting on the appellant was that of providing cars which might safely be coupled by the use of the coupling-stick. The duty of the master under the contract of service was to provide cars that might be coupled without danger by the use of a coupling-stick, and not to provide cars that might safely be coupled by hand. If this was

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the appellant's duty, then it is manifest that, to constitute a cause of action, there must be facts showing a breach of this duty.

We regard the answer as presenting, at least, a *prima facie* defence, and this is sufficient to drive the appellee to a reply.

Judgment reversed.

Filed June 14, 1887.

No. 10,453.

WALKER ET AL. v. HILL ET AL.

APPEAL.—*Certificate to Transcript.*—*Phrase "True and Complete."*—The certification of the transcript of the record, on appeal to the Supreme Court, as "true and correct," instead of "true and complete," in the language of the statute, is sufficient, the former phrase being equivalent to the latter.

SAME.—*Motion to Dismiss.*—*Waiver.*—*Practice.*—A motion to dismiss an appeal on purely technical grounds must be made, if at all, on the first appearance of the moving party in the Supreme Court; otherwise, the objection will be deemed waived.

SAME.—*Joint Assignment of Error.*—*Sufficiency of.*—A joint assignment of errors by two or more appellants will not present any question for decision unless it is good as to all who have united therein.

QUIETING TITLE.—*Guardian's Sale.*—*Ejectment.*—*Former Adjudication.*—*Pleading.*—To a complaint by the heirs of W. against the remote grantees of R. to quiet title to real estate, an answer setting up a judgment rendered in an action prosecuted in his lifetime by W. against R., then in possession and claiming title through a sale made upon petition of the guardian of W., for the recovery of the land, wherein it was decreed that W. was not the owner and was not entitled to the possession thereof, is good.

JUDGMENT.—*Conclusiveness.*—*Collateral Attack.*—*Jurisdiction.*—A judgment rendered by a court having jurisdiction of the subject-matter and of the persons of the parties will stand as against a collateral attack.

SAME.—*Guardian and Ward.*—*Proceedings to Sell Land.*—*Mere Errors and Irregularities not Available Collaterally.*—However irregular and erroneous the proceedings and orders of a court having probate jurisdiction may be, in relation to the sale and conveyance of the real estate of minor

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heirs, upon the petition of their guardians, yet if such proceedings and orders are not void, they are conclusive when questioned collaterally.

STATUTE OF LIMITATIONS.—Guardian's Sale of Real Estate.—Adverse Possession.—Ejectment.—Quieting Title.—Where the purchaser at a guardian's sale, made in 1852, went into immediate possession of the land, causes of action for the recovery thereof and to quiet title thereto accrued at that time, and, even if the sale was void, adverse possession having been continuously held by the purchaser and his grantees, such causes of action are barred. Sections 293 and 294, R. S. 1881.

SAME.—Disabilities.—Infancy.—Where one is under the disability of infancy at the time a cause of action in his favor accrues, the statute of limitations, nevertheless, begins to run, and, under section 296, R. S. 1881, the only effect of such disability is to give the party, if the full limitation has run during his infancy, two years after reaching legal age within which he may sue.

SAME.—Infancy and Coverture.—Where the statute of limitations begins to run during infancy, it is not impeded by the subsequent intervention of the disability of coverture, as one disability can not be tacked to another to stay the operation of the statute.

From the Jennings Circuit Court.

D. Waugh and *T. T. Walker*, for appellants.

T. C. Batchelor, for appellees.

Howk, J.—This was a suit by the appellants, Thomas T. Walker and Eleanor Baxter, as plaintiffs, against the appellees, Joanna, Mary, Carrie and Emma Hill, as defendants, in a complaint of three paragraphs. The first paragraph was a complaint, in the ordinary form, to recover the possession of certain described real estate in Jennings county; and the second and third paragraphs were each a complaint to quiet the appellants' title to the same real estate as against the appellees. The cause was put at issue and tried by the court; and, at the appellants' request, the court made a special finding of the facts, and stated its conclusions of law thereon, in favor of the appellees, the defendants below. Over the appellants' exceptions to the conclusions of law, the court rendered judgment against them for appellees' costs.

The appellees have filed a written motion to dismiss this appeal, upon the ground that the transcript of the record is

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not certified by the clerk below, in conformity with the requirements of section 462, R. S. 1881. The objection to the certificate is, that the clerk certifies the transcript to be a "true and correct" copy, instead of "true and complete," in the language of the statute. In *Anderson v. Ackerman*, 88 Ind. 481, where the same objection was made to a certified transcript of a judgment offered in evidence, it was held that the words "true and complete," as used in the statute, can not be regarded as technical; and the words "true and correct," as used in the clerk's certificate, are equivalent in meaning to the statutory words. Besides, this appeal was submitted, by the agreement of the parties, upon the transcript as now certified, without any objection then made to the certificate; and nearly five months elapsed after such submission before the appellees filed their motion to dismiss the appeal on account of the supposed defects in the clerk's certificate. The motion came too late. Such a purely technical motion must be made, if made at all, on the first appearance of the moving party in this court; otherwise, the objection will be regarded as waived. *People's Savings Bank v. Finney*, 63 Ind. 460; *Field v. Burton*, 71 Ind. 380; *Easter v. Severin*, 78 Ind. 540; *Martin v. Orr*, 96 Ind. 491.

Upon the record of this cause, appellants Thomas T. Walker and Eleanor Baxter have jointly assigned the following errors, namely:

1. The court erred in overruling appellant Walker's separate demurrer to the second, third, fourth and sixth paragraphs of appellees' joint answer.

2. The court erred in overruling appellant Baxter's separate demurrer to the second, third, fourth and sixth paragraphs of appellees' joint answer.

3. The court erred in overruling appellant Walker's separate demurrer to the third paragraph of appellee Joanna Hill's separate answer.

4. The court erred in overruling appellant Baxter's sep-

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arate demurrer to the third paragraph of appellee Joanna Hill's separate answer.

5. The court erred in sustaining appellee Joanna Hill's separate demurrer to the second paragraph of appellant Walker's reply to the second and sixth paragraphs of appellees' joint answer.

6. The court erred in sustaining Joanna Hill's separate demurrer to Walker's second reply to the third paragraph of Joanna Hill's separate answer.

7. The court erred in sustaining Joanna Hill's separate demurrer to Baxter's second reply to the third paragraph of Joanna Hill's separate answer.

8. The court erred in sustaining Joanna Hill's separate demurrer to Baxter's second reply to the second, third and sixth paragraphs of appellees' joint answer.

9. The court erred in sustaining appellees' joint demurrer to Walker's second reply to the second and sixth paragraphs of appellees' joint answer.

10. The court erred in sustaining appellees' joint demurrer to Baxter's second reply to the second, third and sixth paragraphs of appellees' joint answer.

11. The court erred in sustaining Joanna Hill's separate demurrer to appellants' joint reply to the fourth paragraph of appellees' joint answer.

12. The court erred in sustaining appellees' joint demurrer to appellants' joint reply to the fourth paragraph of appellees' joint answer.

13. The court erred in its conclusions of law upon its special finding of facts.

The point is made by appellees' counsel, and, under our decisions, it is well made, that the first ten errors, jointly assigned as above by the appellants herein, are not well assigned, and do not, nor does either of them, present any question for our decision. In this court, the assignment of errors constitutes the complaint of the appellants, and, like a complaint in a trial court, it must be good as to all who join

therein, or it will not be good as to any of them. Where two or more appellants join in one assignment of errors, if they jointly complain in any specification or paragraph of such assignment of a ruling against one of them only as error, such specification or paragraph of error can not be sustained as to any one, because it is not well assigned by all who have joined in such assignment. *Hinkle v. Shelley*, 100 Ind. 88; *Tucker v. Conrad*, 103 Ind. 349; *Hochstedler v. Hochstedler*, 108 Ind. 506. This conclusion disposes of the first ten errors complained of here by the appellants, and we pass to the consideration of the eleventh alleged error, namely: The sustaining of Joanna Hill's separate demurrer to appellants' joint reply to the fourth paragraph of appellees' joint answer.

The fourth paragraph of appellees' joint answer was filed as a partial defence to the third paragraph of appellants' complaint. It was shown by the allegations of the third paragraph of complaint that appellants' father, William R. Walker, prior to May 17th, 1851, died intestate, and seized in fee simple of the real estate now in controversy, and that he left, as his only surviving children and heirs at law, the two appellants and one John Walker, all of whom were then minors under the age of twenty-one years. It was further shown that the interest of said John Walker in such real estate was sold and conveyed, upon the petition of the legal guardian of John Walker and pursuant to the orders of the proper court, to the Peru and Indianapolis Railroad Company; and that, before the commencement of this suit, the said John Walker died intestate and without issue, leaving the appellants, his brother and sister, as his only heirs at law. The fourth paragraph of appellees' joint answer was pleaded in bar of that part of the third paragraph of complaint wherein appellants, as the only heirs at law of their deceased brother, John Walker, sought to have their title, as such heirs, quieted in and to the real estate in controversy, as against appellees.

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In such fourth paragraph of their answer, appellees alleged that, in the lifetime of John Walker, to wit, on the — day of February, 1858, said John Walker brought an action for the recovery of the real estate now in controversy against one William Rowley, in the Jennings Circuit Court; that, on that day, and for a long time afterwards, William Rowley was in possession of, and claiming title to, such real estate under and by reason of the aforesaid guardian's sales and conveyances, and under and by virtue of no other claim or title whatever, the said Rowley being the grantee of the Peru and Indianapolis Railroad Company; that such proceedings were had in said action that judgment was therein rendered by the court against John Walker, and in favor of William Rowley, that John Walker was not the owner of such real estate or of any part thereof, and was not entitled to possession thereof; that such judgment had never been reversed, annulled or set aside, but remained in full force; that it was rendered on the same cause of action mentioned in the third paragraph of appellants' complaint in this case, in so far as such paragraph sought to recover the interest in such real estate which, before said guardian's sales, belonged to said John Walker, since deceased; and that said William Rowley was a grantor of the appellees, and they claimed title to, and were in the possession of, such real estate through said William Rowley, and through and under the title thereto which he successfully opposed to John Walker's action.

It is claimed by appellants' counsel, that this fourth paragraph of appellees' joint answer was not good even as a partial defence to the cause of action stated in the third paragraph of the complaint herein. If this claim of counsel were correct, then, as appellees' demurrers to appellants' joint reply to such fourth paragraph of answer searched the record, such demurrers ought to have been carried back and been sustained by the court to such paragraph of answer. In discussing the alleged insufficiency of the fourth paragraph of appellees' joint answer, appellants' counsel say: "The

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adjudication referred to in this paragraph did not establish Rowley's title. The pertinent question now is, where and how did appellees derive their title? They must rely on the strength of their own title, and not on the weakness of ours." It is true, perhaps, that the adjudication did not establish Rowley's title; but it did establish conclusively that John Walker and the appellants, in so far as they claimed under John, had no such title to the real estate as would enable him or them to recover the interest which John Walker had therein prior to the guardian's sales, either from William Rowley or from the appellees who claimed under Rowley. That far forth, the adjudication pleaded in the fourth paragraph of appellees' joint answer constituted a complete bar to the maintenance of appellants' action. *Campbell v. Cross*, 39 Ind. 155; *Parker v. Wright*, 62 Ind. 398.

Appellants' counsel do not state the law correctly, as applicable to this case, in the above quotation from their brief herein, when they say that the appellees "must rely on the strength of their own title, and not on the weakness" of appellants' title. The reverse of this statement is the law in the case under consideration. The appellants were the plaintiffs and the appellees were the defendants in the case in hand. The rule is old, and almost elementary, which requires that, in such an action, the plaintiff must recover, if he recover at all, upon the strength of his own title; and that, unless he have a good and sufficient title, the weakness of the defendant's title, or his want of title, will afford the plaintiff no ground for recovery. *Huddleston v. Ingels*, 47 Ind. 498; *Williams v. Venner*, 53 Ind. 396; *Shipley v. Shook*, 72 Ind. 511; *Brandenburg v. Seigfried*, 75 Ind. 568; *Castor v. Jones*, 107 Ind. 283.

We are of opinion that the facts stated in the fourth paragraph of appellees' joint answer were sufficient to constitute a good partial defence to the third paragraph of appellants' complaint.

In their joint reply to such fourth paragraph of appellees'

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joint answer, the appellants alleged that, on the 25th day of February, 1858, suit was commenced in the Jennings Circuit Court in the name of John Walker, as plaintiff, against William Rowley, as defendant, for the recovery of the undivided one-third part of the real estate now in controversy; that at the March term, 1858, of such court, said Rowley appeared to such action and filed an answer to the complaint therein, which answer the appellants herein allege, in their joint reply, consisted of a transcript of the proceedings of the Jennings Probate Court at its May term, 1851, upon the joint petition of the guardian of said John Walker and Thomas T. Walker, one of the appellants herein, and of the guardian of Eleanor Walker, now Eleanor Baxter, the other appellant herein, for the sale of the real estate in controversy in this action; that it was shown by such answer or transcript that the prayer of the joint petition of such guardians was granted by the court, and they were authorized by an order of the court to sell such real estate of their said wards at private sale; that such guardians afterwards reported to such court, at its August term, 1852, that pursuant to such order of the court they had sold such real estate of their said wards, at private sale, to the Peru and Indianapolis Railroad Company for the sum of \$2,525 in the stock of such railroad company; that such sale of said real estate was then and there, in all things, approved and confirmed by the court, and a commissioner was appointed by the court to execute and deliver to the purchaser a deed of such real estate; that thereupon such commissioner executed and acknowledged a deed conveying such real estate to said railroad company, and reported such deed to said court; and that such deed of conveyance was approved and confirmed by such court.

Appellants further alleged in their joint reply, that at the March term, 1858, of the court below, a demurrer was filed in the name of John Walker to the second paragraph of Rowley's answer, which demurrer was overruled by the

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court; that John Walker excepted to such ruling, and refused to reply or plead further; and that the court then adjudged that the title to such real estate was in William Rowley, and not in John Walker, and that Rowley go hence and recover of Walker his costs in that behalf expended.

Appellants further alleged, that the second paragraph of Rowley's answer, to which John Walker's demurrer was directed and sustained, was never in fact filed; that William Rowley only owned, in fact, the undivided one-half of the real estate described in John Walker's complaint in such suit, the other undivided one-half thereof being owned at the time, or pretended to be owned, by one John Rowley, who was not a party to John Walker's suit; that such pretended judgment was rendered without any issue of law or fact, upon the overruling of a demurrer to a paragraph of answer which was in fact never filed; that John Walker became of age on August 6th, 1856, and was not a resident of this State after January 1st, 1854, and was not in this State during the pendency of his suit against Rowley, or when the judgment was rendered therein, and that he died soon afterwards at Vicksburg, in Mississippi, where he had long resided; that appellants did not know of the rendition of such judgment against John Walker until after they commenced this suit; and that appellants were the only heirs at law of John Walker, deceased. Wherefore, etc.

It is very clear that the trial court committed no error in sustaining appellees' demurrer to this joint reply of appellants to the fourth paragraph of appellees' joint answer. In this reply, appellants vigorously assail the adjudication pleaded by appellees in such fourth paragraph of their answer, as a partial defence to the cause of action stated in the third paragraph of complaint herein. But appellants' attack upon such adjudication is a collateral one, and although they have pointed out, in their joint reply, a number of defects in the proceedings and judgment in the suit of John Walker against William Rowley, some of which might, perhaps, have

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been available on appeal for the reversal of such judgment, yet, they have wholly failed, we think, to show by any averment that such adjudication was for any cause absolutely void. In the absence of such a showing, it must be held, in conformity with all our decisions, that such joint reply was clearly bad on appellees' demurrer thereto. Of course, the Jennings Circuit Court had jurisdiction of the subject-matter of the suit of John Walker against William Rowley, and the court's jurisdiction of the persons of the parties to such suit is clear and unquestioned. In such case, the adjudication of the court, however erroneous it may be, is absolutely impervious to collateral attack. *Reid v. Mitchell*, 93 Ind. 469; *Dowell v. Lahr*, 97 Ind. 146; *Exchange Bank v. Ault*, 102 Ind. 322; *Indiana, etc., Co. v. Louisville, etc., R. W. Co.*, 107 Ind. 301.

What we have said, in considering the eleventh alleged error, applies with equal force to the twelfth error assigned by the appellants, namely: The sustaining of appellees' joint demurrer to appellants' joint reply to the fourth paragraph of appellees' joint answer. Like the eleventh alleged error, this twelfth error calls in question the sufficiency of the facts stated by appellants in their joint reply to avoid the fourth paragraph of appellees' joint answer. Upon full consideration of this question, as presented by the eleventh alleged error, we held that the facts stated by appellants in their joint reply were not sufficient to avoid the fourth paragraph of appellees' joint answer, and to this decision we adhere.

The last error of which appellants complain is that the court below erred in its conclusion of law upon its special finding of facts.

The facts found specially by the court were, substantially, as follows:

William R. Walker died in June, 1847, intestate. He left as his heirs at law his sons, John and Thomas Walker, and his daughter, Eleanor Baxter, *nee* Walker, the last two being the plaintiffs in this action. He left a widow, Penelope

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Walker, who was the mother of the three children named. John Walker was born August 6th, 1835; Thomas T. Walker was born September 17th, 1837, and Eleanor Baxter February 23d, 1842. Penelope Walker intermarried with Edward M. Sharp in May, 1849, and continued his wife until her death, on December 6th, 1879. Eleanor Baxter, in November, 1858, became and has been since the wife of Joseph K. Baxter. John Walker died intestate in Mississippi, August 27th, 1858, never having married, and leaving as his heirs his mother, brother and sister above named. When Penelope Sharp died she left as her heirs the plaintiffs herein, her husband, Edward M. Sharp, and five children by Sharp. William R. Walker, at his death, was the owner in fee simple of the real estate in controversy.

On November 12th, 1850, John S. Torbit was appointed and qualified as guardian of John and Thomas T. Walker, and, on the same day, Edward M. Sharp was appointed and qualified as guardian of Eleanor Baxter, then Walker. On May 16th, 1851, the two guardians aforesaid filed in the probate court of Jennings county (where such real estate was situate and said guardians were appointed) their joint petition for the sale of the real estate in controversy, and, also, their additional bond for such sale, as required by the statute, in the penalty of \$2,040, which bond was accepted and approved by such court. On the same day the appraisers, then appointed, made and reported their appraisement of such real estate at the value of \$705, which appraisement was accepted and approved by such court. Thereafter, on the same day, such two guardians were ordered by the court to sell such real estate, at public or private sale, for the best price to be obtained therefor, one-fourth of the purchase-money to be paid in cash, and the residue in two equal annual payments, with six per cent. interest from the date of sale; and such order of the court was duly entered of record therein.

On May 21st, 1852, such real estate was sold to the Peru and Indianapolis Railroad Company, at private sale, for

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\$2,525, payable in the capital stock of said company. The sale of said real estate was a joint sale, made by said two guardians. On August 14th, 1852, the sale of such real estate to said railroad company, for the amount, and payable as aforesaid, was duly reported to such probate court. At the time of such sale, and for at least two years afterwards, the stock of such railroad company, received in payment for such real estate, was worth and could have been sold for from 50 to 75 cents on the dollar. The report of such sale was accepted and approved, and the sale, as made, was confirmed by such court, and a commissioner was then and there appointed to execute a conveyance of such real estate to the purchaser thereof. On the same day, the commissioner so appointed executed and acknowledged a conveyance of such real estate to the Peru and Indianapolis Railroad Company, and reported such deed to such court, and the deed was approved by the court and delivered to such purchaser. The stock of such railroad company, for which such real estate was sold, was delivered to said guardians at the time of such sale, issued in the names of their said wards. Immediately after the execution of such deed to said railroad company, it went into possession of such real estate, claiming title and the right of possession under such sale and conveyance, and continued in possession until March 1st, 1855, when it sold and conveyed such real estate, by its warranty deed, to William Rowley and put him in possession thereof.

The court then finds that, through a series of mesne conveyances, particularly described, the same title acquired by William Rowley from said railroad company in and to such real estate, became vested in one James M. Hill on November 27th, 1872, who took and continued in the possession thereof until he died, testate, in June, 1875. On June 18th, 1875, the last will of James M. Hill, deceased, was duly probated, and under such will appellee Joanna Hill became the owner of such real estate upon the death of such testator, and had been in possession thereof ever since. On February

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25th, 1858, John Walker commenced an action in the court below to recover his interest in said real estate. Such action was brought against William Rowley, the immediate grantee of the Peru and Indianapolis Railroad Company, he being in possession of such real estate under his conveyance as grantee of such railroad company. At that time, John Rowley was in possession of the undivided one-third part of such real estate, under a conveyance from William Rowley and his wife. William Rowley was the only defendant. He appeared to such action and recovered judgment against John Walker, the plaintiff therein, quieting his, Rowley's, title to such real estate. Such judgment is still in force.

As a conclusion of law upon the foregoing facts, the court found the law to be with the defendants.

In discussing the alleged error of the trial court, in its conclusion of law upon its special finding of facts, appellants' counsel very earnestly insist that the entire proceedings and orders of the probate court of Jennings county, as set forth in such special finding, in relation to the sale and conveyance of appellants' real estate upon the joint petition of their respective guardians, were and are wholly void. We do not think that this position of counsel can be sustained. It may be conceded that there were imperfections, irregularities and even errors, perhaps, in such proceedings and orders of such probate court, which might have afforded sufficient cause for the reversal thereof on an appeal therefrom to this court, at the proper time and in the proper manner; but, under the law of this State in force at the time, the probate court of Jennings county was a court of general jurisdiction, and specially vested with jurisdiction of the petitions of the guardians of minors for the sale of the real estate of their wards. However irregular and erroneous the proceedings and orders of that court may have been, in relation to the sale and conveyance of the real estate of the appellants, upon the petition of their respective guardians, such proceedings and orders were not void, but must be held valid and conclusive

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against appellants when questioned collaterally as in this case. This is settled by many of our decisions. *Dequindre v. Williams*, 31 Ind. 444; *Gavin v. Graydon*, 41 Ind. 559; *Porter v. Stout*, 73 Ind. 3; *Davidson v. Koehler*, 76 Ind. 398; *Million v. Board, etc.*, 89 Ind. 5, and cases cited, p. 14; *Dowell v. Lahr*, 97 Ind. 146; *Anderson v. Wilson*, 100 Ind. 402; *Indiana, etc., Co. v. Louisville, etc., R. W. Co.*, 107 Ind. 301.

In another view of the facts found by the trial court, and for another reason, we are of opinion that the court did not err in finding that the law of the case was with the defendants as its conclusion of law. Upon the confirmation of the guardian's sale of the real estate in controversy, on August 14th, 1852, a deed therefor was duly executed, under the order of the probate court of Jennings county, to the purchaser thereof, and was approved by such court and delivered to such purchaser on the same day. Immediately after the execution of said deed to such purchaser, the Peru and Indianapolis Railroad Company, it went into possession of such real estate, claiming title and the right of possession under such sale and conveyance. This title and possession were, of course, adverse to any claim of appellants, and such adverse possession was continuous in the successive grantees of such real estate, down to and including the appellees herein. From the facts found by the trial court, it is manifest that appellants' causes of action for the recovery of the real estate in controversy, and for quieting their title thereto, accrued in August, 1852, and were severally barred by our statute of limitations long before the commencement of this suit. This is so, even if it be conceded that the guardians' sale of such real estate and the commissioner's conveyance thereof were absolutely void. Sections 293, 294, R. S. 1881; *Hatfield v. Jackson*, 50 Ind. 507; *Brown v. Maher*, 68 Ind. 14; *Ray v. Detchon*, 79 Ind. 56; *Second Nat'l Bank, etc., v. Corey*, 94 Ind. 457; *Wright v. Wright*, 97 Ind. 444.

It is true, the trial court found that the appellants, at the time their causes of action herein accrued, were both under

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the disability of infancy; but it is also true that, as to each of them, the disability of infancy was removed much more than two years before they commenced this action. Under our law the statute of limitations began to run against the appellants, notwithstanding their infancy, when their causes of action herein accrued, and the only effect of such disability was to give each of them, if the full limitation had run during his or her infancy, two years after the disability was removed within which he or she might sue. Section 296, R. S. 1881; *Wright v. Kleyla*, 104 Ind. 223.

It is true, also, the court further found that appellant Eleanor Baxter, after her causes of action herein had accrued and before she was of lawful age, had intermarried with Joseph K. Baxter, and had been since and still was his wife. But the statute of limitations had already commenced to run against her before her marriage, and her disability of coverture could not be tacked to her disability of infancy to stay the operation of the statute. The rule in such case is, that where it is incumbent on the plaintiff to show that he or she labored under any disability, it must be shown to be a continuing disability from the first, and that when the statute has once begun to run no subsequent disability will impede it. *Kistler v. Hereth*, 75 Ind. 177; *White v. Clawson*, 79 Ind. 188; *Knippenberg v. Morris*, 80 Ind. 540; *Sims v. Gay*, 109 Ind. 501.

Upon the facts found by the court, there is no error, we think, in its conclusion of law.

The judgment is affirmed, with costs.

Filed June 14, 1887.

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CONTRACT.—Conveyance.—Married Woman.—Release of Inchoate Interest.—

Consideration.—Statute of Frauds.—The complaint in this case alleged that the plaintiff's husband sold a tract of land belonging to him to the defendant, the plaintiff joining in the conveyance; that the consideration for the land and the conveyance was the promise of the defendant to pay her five hundred dollars, it being agreed that he should sell the land as soon as he could procure a purchaser and pay said sum to plaintiff; that he had had frequent opportunities to sell the land for its full value, but had neglected and refused to do so; that he had refused to pay plaintiff the agreed sum; that he denied making the promise, and claimed that he was under no obligation to pay her any amount whatever.

Held, that the contract is supported by a sufficient consideration, is not within the statute of frauds, and that the complaint is good on demurrer.

From the Delaware Circuit Court.

R. S. Gregory, A. C. Silverburg and C. W. Moore, for appellant.

W. W. Orr and J. E. Mellette, for appellee.

ZOLLARS, C. J.—Appellee alleged in her complaint, in substance, that in 1879 her husband was the owner of a tract of land which he sold to appellant; that the consideration for the land, and the conveyance by her and her husband, was a promise on the part of appellant to pay to her the sum of five hundred dollars; that it was agreed that appellant should sell the land after it should be conveyed to him, as soon as he could procure a purchaser therefor, and pay to appellee the agreed sum of five hundred dollars; that appellant had had frequent opportunities to sell the land for its full value, but had neglected and refused to sell it; that he had refused to pay to her the five hundred dollars, denied ever having promised to pay the same, and claimed that he was not under any obligations to pay her that, or any other amount.

The court below overruled a demurrer to the complaint. That ruling appellant has assigned as error.

His contention, as we understand the argument of his

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counsel, is: *First*. That the complaint shows that the amount is not due. In other words, that, according to the averments in the complaint, the amount was not to be paid until appellant should sell the land, and that it was a matter purely optional with him as to when he should sell it. *Second*. That as the agreement to pay to appellee the five hundred dollars was not in writing, it was within the statute of frauds, and can not be enforced; first, because it was a contract for the sale of land, and second, because it was a contract not to be performed within one year. R. S. 1881, section 4904.

That there was a sufficient consideration for the promise is clear. The release of appellee's inchoate interest in the land was a sufficient consideration. *Jarboe v. Severin*, 85 Ind. 496; *Hollowell v. Simonson*, 21 Ind. 398; *Brown v. Rawlings*, 72 Ind. 505.

Here, however, it appears, from the averments in the complaint, that the consideration for the agreement on appellant's part was not only the relinquishment by appellee of her inchoate interest in the land, but, also, the sale and conveyance of the land by the husband.

The contract which appellee is seeking to enforce is clearly not a contract for the sale of land. The sale of the land was perfected and fully executed by the execution of the deed and the possession given to, and accepted by, appellant. Nothing remained but the payment of the purchase-money; that may be recovered, notwithstanding the statute. *Sands v. Thompson*, 43 Ind. 18 (22); *Huston v. Stewart*, 64 Ind. 388 (395); *Reyman v. Mosher*, 71 Ind. 596; *Arnold v. Stephenson*, 79 Ind. 126.

Nor was the contract for payment set up in the complaint within that clause of the statute which provides that no action shall be brought upon any agreement not to be performed within one year, unless the agreement is in writing. *Hill v. Jamieson*, 16 Ind. 125; *Fall v. Hazelrigg*, 45 Ind. 576; *Baynes v. Chastain*, 68 Ind. 376 (380); *Cole v. Wright*, 70 Ind. 179 (197).

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The demurrer admits as true the averments of the complaint, that appellant agreed to sell the land and pay to appellee the five hundred dollars as soon as he could find a purchaser; that he had had frequent opportunities to sell it for its full value, but neglected and refused to sell, and finally denied the existence of any agreement or any liability.

Whatever might otherwise be said of the agreement to pay, and the duty of appellant to sell the land within a reasonable time, it is certain that he can not deny the existence of the agreement, and at the same time insist upon its terms to show that the amount is not due. Having denied the existence of the agreement, and having refused to pay upon that ground, he is no longer in a position to insist that the amount can not become due until the sale of the land, and that he may consult his own convenience as to when he shall sell it. *Durland v. Pitcairn*, 51 Ind. 426, and cases there cited; *Fry v. Louisville, etc., R. W. Co.*, 103 Ind. 265.

The demurrer to the complaint was properly overruled.

There is evidence tending to sustain the verdict and judgment in favor of appellee; this court can not, therefore, reverse the judgment upon the weight of the evidence.

Judgment affirmed, with costs.

Filed June 14, 1887.

No. 12,469.

THE CITY OF INDIANAPOLIS v. VAJEN.

TAXES.—Assessment of National Bank Stock.—Right of Owner to Deduct Indebtedness.—The owner of national bank stock is entitled to deduct from its value, if he have no other credits from which the deduction can be made, the amount of the *bona fide* debts owing by him.

SAME.—Refusal to Allow Deduction.—Erroneous Assessment.—City.—Refunding Taxes Erroneously Collected.—Where a taxpayer, in making his assessment list for city taxation, gives notice of his indebtedness, but does

111	240
112	350
117	413
121	189

111	240
137	32

111	240
152	248

111	240
158	577

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not enter it upon his list, and demands of the assessor the right to deduct from the value of his national bank stock the amount of his *bona fide* indebtedness, which that officer refuses to allow on the ground that such deduction is not authorized by law, and afterwards makes a like demand of the city treasurer before paying his taxes, which is also refused, the assessment, to the extent of the deduction improperly denied, is erroneous, and the taxpayer is entitled to have the excess of taxes collected refunded, whether paid voluntarily or not, and without appearing before the board of equalization and there attempting to have the assessment corrected.

From the Marion Superior Court.

C. S. Denny, for appellant.

J. S. Duncan, C. W. Smith and J. R. Wilson, for appellee.

MITCHELL, J.—Vajen recovered a judgment against the city of Indianapolis in the court below for the amount of taxes alleged to have been erroneously assessed against and collected from him, by the city, through its officers, on account of certain shares of stock in a banking association, organized under the laws of the United States.

The facts material to be stated, as specially found by the court, are, briefly, as follows: On the 1st day of April, 1880, Vajen was the owner of 336 shares of the stock of the Citizens National Bank of Indianapolis, which stock was of the face value of \$100 per share. He was at the same time indebted to an amount largely in excess of the value of his stock. In assessing national bank stock, it was the uniform habit of the city assessor to refuse permission to the plaintiff, and all other owners of national bank stock, to deduct the amount of their indebtedness from the value of their shares. Substantially, the only credits due the plaintiff at that time from which his indebtedness could have been deducted were his bank stock. The cashier of the bank made out duplicate statements, showing the number of shares comprising the capital stock of the bank and the residence of each stockholder, and the number of shares owned by each, according to the provisions of section 64, vol. 1, R. S. 1876, 89 (section

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6345, R. S. 1881). After the duplicate statements had been delivered, as provided by law, the assessor proceeded to assess the shares against the several owners thereof, assessing against the plaintiff on account of the shares owned by him the sum \$21,935.67. This amount was duly extended on the tax duplicate, and a tax amounting to \$186.45 levied and extended against the latter on his stock for the year 1880. When the plaintiff made up his assessment list for that year he gave notice of his indebtedness, and demanded of the assessor the right to deduct from the value of his bank stock the amount of *bona fide* debts owing by him. This the assessor refused to allow, on the ground, as he claimed, that such deductions were not authorized by law. The plaintiff thereupon made return of his personal property upon the ordinary blank, without any statement thereon of his stock or indebtedness. At the proper time the tax duplicate, with the tax thereon extended, was delivered to the city treasurer for collection. Vajen at first refused to pay the tax against his bank stock. Subsequently, on the 28th day of September, 1881, after the treasurer had made demand, the plaintiff paid the tax, protesting that, for the reasons above mentioned, the taxes against his bank stock were illegally and erroneously assessed.

Similar proceedings, substantially, were had with reference to the assessment of 1881, the amount assessed for that year being \$273.37. The taxes for 1881 were paid after the duplicate was delivered to the city treasurer, before any demand by the officer, the plaintiff demanding from the treasurer a deduction on account of his indebtedness, which demand was refused. In each case proper demand was made from the city by petition praying for the refunding of the taxes.

Upon the foregoing facts the court stated as its conclusions of law, that the payments were voluntarily made, but that, under the ruling in *City of Indianapolis v. McAvoy*, 86 Ind. 587, the plaintiff below was, nevertheless, entitled to recover from the city the several amounts thus paid.

The plaintiff below excepted to the first conclusion of law

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stated by the court, and the city excepted to the second.

Error and cross error are assigned by the parties respectively. There is no controversy but that, under the ruling in *Wasson v. First Nat'l Bank, etc.*, 107 Ind. 206, the plaintiff was entitled to deduct his *bona fide* indebtedness from the value of his bank stock, if proper steps to that end had been taken before payment of the tax.

The questions discussed are, were the payments to the city treasurer, under the circumstances as disclosed, voluntary? and was the plaintiff entitled to recover the amounts paid, in any event, as the facts appear, whether the payments were voluntary or involuntary?

On behalf of the city, it is contended that the plaintiff had the right, and that it was his duty, to make out and return to the assessor under oath a list of his personal property, exhibiting on such list the amount of his credits, and showing the amount of his indebtedness, which he claimed the right to deduct. Having failed so to make and return his list, the argument is, that the demand made upon the assessor and treasurer to be allowed to make the deduction goes for nothing. This argument is predicated upon sections 6330 to 6334, R. S. 1881, inclusive. These sections provide for the listing and return of personal property by the owner for purposes of taxation. Provision is made for a statement by the lister of the credits due and owing him, and also that he shall be entitled to deduct from the gross amount of his credits the amount of all *bona fide* debts owing by him. The latter section provides that the assessor shall require that all deductions claimed shall be verified by the oath of the person claiming the deduction, and that the oath shall form part of the statement of the person listed. Whatever force there might be in the position contended for, under other circumstances, it is entitled to no consideration as applied to the facts in the case before us. The manner of listing and assessing bank and other corporate stocks is peculiar, as compared with the listing of other personal property. In respect

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to shares in a banking corporation, section 6345, R. S. 1881, makes it the duty of the president, cashier, or other accounting officer of each bank located within this State to make duplicate statements, under oath, showing the number of shares comprising the capital stock of the bank, and the name and residence of each stockholder, with the number of shares owned by each, and what he deems the fair cash value of each share, and the fair cash value of the entire capital stock of the bank. One of these statements is to be delivered to the township assessor, and the other to the county auditor. It is then made the duty of the assessor to list, assess and return the capital stock, in all respects the same as similar property belonging to other corporations and individuals. An examination of the list or schedule which the assessor is required to furnish each owner of personal property, as well as a consideration of the several statutes, will make it apparent that it was not contemplated that owners of bank shares, or, indeed, shares in any domestic corporation doing business within this State, should list their shares of stock with their other personal property. It would seem, therefore, that the statement of credits and the deduction of indebtedness for which specific provision is made, and which is required to be verified by the oath of each owner of personal property, and returned with his assessment, is not applicable to bank shares and such deductions therefrom as the owner may be entitled to make.

The right of owners of national bank stock to deduct from its value the amount of their *bona fide* indebtedness results rather from the construction which the Supreme Court of the United States has given the law under which national banking associations are organized, and the revenue laws of the States as applied to such associations, than from any specific provision to that effect in the revenue law of this State. While we may assume that the Legislature of the State, acting in subordination to the law of Congress, contemplated that such deductions might be made, we are compelled to

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admit that no special provision is found in the statute pointing out the precise method by which that end is to be accomplished. Since, therefore, one whose moneyed capital is invested in shares in a national banking association can not put such capital down on his assessment list as credits due and owing him, and deduct therefrom his *bona fide* indebtedness, it follows that the only practical method by which he can obtain the benefit of the law is to notify the assessor, at the proper time, of the amount of his indebtedness not already deducted from other credits on his tax list, and demand that the proper reduction be made on the list which the assessor is required to make and return under section 6345. *McMahon, In re, v. Palmer*, 102 N. Y. 176 (55 Am. R. 796). When such a deduction is claimed, it would doubtless be the duty of the assessor to require that the amount thereof should be verified by the oath of the person claiming the deduction, as provided in section 6334. A failure to require the oath would, however, not be the default of the person making the claim.

The special findings show that the demand was duly made of the assessor, and that the latter refused to make any deduction, not because the claim was not properly made by the plaintiff on his assessment list, nor because of his failure to comply with any requirement of the assessor, but because the latter denied his right, under the law, to be allowed any deduction of indebtedness from the value of his stock. The facts found make it very clear that whatever the plaintiff might have done by way of making statements, or in whatever form he might have presented his claim for deductions, it would, in any event, have been unavailing. According to the rule, where the tender of performance is a prerequisite to the establishment of a right against another, the offer to perform becomes unnecessary when the conduct of the other party is such as to make it reasonably certain beforehand that the offer will be refused. *Hills v. Exchange Bank*,

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105 U. S. 319; *People v. Olmsted*, 45 Barb. 644; *Ford v. Holden*, 39 N. H. 143.

The city assessor having refused to allow deductions, upon notice and demand, on the ground that no such deductions would be allowed in any case, because the law did not authorize them to be made, the city will not now be allowed to shift its position, and put its defence on the ground that the demand was not made in proper form.

The court having first reached the conclusion that, upon the facts found, the taxes were voluntarily paid, and having as its second conclusion stated that the city was, nevertheless, liable under the ruling in *City of Indianapolis v. McAvoy, supra*, it becomes proper first to examine the propriety of the conclusion last stated. If it be true that, whether the payment was voluntary or involuntary, the city is in either event liable to refund, it is, obviously, immaterial and unnecessary to consider the propriety of the first conclusion, which is called in question by the appellee's cross error.

It is a well established doctrine of the common law that a party who, without fraud or imposition, pays an illegal demand, having at the time knowledge of all the facts which render the demand illegal, unless payment be made upon some immediate or urgent necessity, or to release his person or property from detention, or to prevent the immediate seizure of his person or property, such payment will be deemed to have been voluntarily made. To a party who thus pays an illegal demand the common law affords no right of recovery. *Jenks v. Lima Tp.*, 17 Ind. 326; *Lima Tp. v. Jenks*, 20 Ind. 301; *Town of Ligonier v. Ackerman*, 46 Ind. 552 (15 Am. R. 323); *Board, etc., v. Armstrong*, 91 Ind. 528; *Board, etc., v. Ruckman*, 57 Ind. 96; *Lamborn v. County Com'rs*, 97 U. S. 181; *Railroad Co. v. Commissioners*, 98 U. S. 541; *Union Ins. Co. v. City of Allegheny*, 101 Pa. St. 250.

It should be observed, however, that the rule of the common law does not control in cases where a positive statute

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makes it the duty of a municipal corporation to refund to the taxpayer money collected for taxes wrongfully or erroneously assessed. In case it is so directed by statute, it becomes the duty of the corporation to refund money received by it for taxes assessed upon property which, according to law, was not justly subject to the assessment, and it is no defence in such a case that the taxes were voluntarily paid. In such a case the question will be whether or not, according to the facts of which the assessing officer had notice, or with which the law charged him with knowledge, the property was justly subject to the tax assessed against it. Mere irregularity will not make the assessment wrongful or erroneous in such sense as to make the corporation liable to refund. Where, however, the property was not subject to the tax, and the corporation has, hence, no equitable right to the money it has received, it may be compelled to refund, when that duty is enjoined by statute. *City of Indianapolis v. McAvoy, supra*; *Board, etc., v. Graham*, 98 Ind. 279; *Newsom v. Board, etc.*, 92 Ind. 229; *Board, etc., v. Ruckman*, 57 Ind. 96; *Durham v. Board, etc.*, 95 Ind. 182; *Board, etc., v. Murphy*, 100 Ind. 570; *Board, etc., v. Armstrong*, 91 Ind. 528; *People, ex rel., v. Supervisors, etc.*, 51 N. Y. 401.

Section 3157, R. S. 1881, being a part of the general law for the incorporation and government of cities, provides, among other things, that the common council may at any time order the amount of taxes erroneously assessed against and collected from any taxpayer to be refunded to him. In respect to the refunding of taxes, this provision has been held mandatory. *City of Indianapolis v. McAvoy, supra*.

As has already been seen, the taxes against the appellee's bank stock were erroneously assessed, in that the assessor refused, after proper notice and demand, to allow any deduction from the value of the stock on account of the *bona fide* indebtedness of the owner. It was the assessor's duty to assess and return the bank stock, from the duplicate schedule furnished him, according to the provisions of the statute, and

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if the owner had permitted the assessment and return to be completed, without notifying the assessing officer that he claimed and was entitled to a deduction from the value of his stock on account of *bona fide* debts owing by him, it might be a question whether he could have thereafter challenged it as erroneous. The assessment would have been within the authority of the assessor, and not erroneous. Where, however, the officer receives proper notice, while the assessment is *in fieri*, that the shareholder owes *bona fide* debts, which he is entitled to have deducted from the value of his stock, it then becomes the duty of the assessor to allow such deductions in the same manner and under the same regulations as deductions are allowed in respect to other credits belonging to individuals. If the assessing officer afterwards proceeds in disregard of such notice and demand, the assessment will be erroneous to the extent that deductions to which the taxpayer is justly entitled are denied. *Supervisors v. Stanley*, 105 U. S. 305.

It appears from the special finding, that the appellee notified the assessor on each occasion, when he returned his list, that his indebtedness was largely in excess of his other credits, and demanded that it should be deducted from the value of his bank shares. The notice and demand were disregarded, on the ground that the law did not allow such deductions to be made, and not because of any informality in giving notice. The appellee was accordingly assessed for the full value of his stock without any deduction. This was an erroneous assessment. Taxes were paid to the city collector which were not justly due to the city, and the case, therefore, comes within the very terms of the statute which requires taxes so assessed and collected to be refunded. The city was not exonerated from the duty of refunding because the appellee did not appear before the board of equalization and there attempt to have the erroneous assessment corrected. The taxes were erroneously assessed. An erroneous assessment and collection are the conditions which

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require the city to refund. The existence of these conditions was found, and the city is liable.

The judgment is affirmed, with costs.

Filed June 14, 1887.

 No. 12,528.

HARVEY ET AL. v. FINK.

111	249
135	613

NEW TRIAL.—As of Right.—Motion to Vacate Order Granting.—Practice.—

Where a party is in court, by his attorneys, when an order is made granting the opposite party a new trial as of right, and does not object thereto, he can not afterwards move to vacate the order upon the ground that it was made without his knowledge or consent.

SAME.—When Motion to Vacate Must be Made.—A motion to vacate and set aside an order granting a new trial as of right must be made at the earliest practicable moment to be available.

SAME.—Motion for New Trial After Term.—Where a verdict is returned on Thursday of the last week of a term of court, a motion for a new trial made on the fourth day of the next term comes too late, under section 561, R. S. 1881, and can not be entertained.

APPEAL.—Complaint for New Trial.—Separate Action.—The proceedings upon a complaint for a new trial after the close of the term at which a cause has been disposed of constitute a separate and distinct action, and from the judgment rendered therein an appeal may be taken to the Supreme Court. An appeal from the judgment in the original cause does not present for review the judgment rendered upon the complaint for a new trial.

SAME.—Review of Judgment.—Waiver.—Where a party files a complaint for review for alleged errors of law only, and prosecutes the proceeding to final judgment, he can not afterwards appeal from the judgment sought to be reviewed, as the adoption of one remedy waives the other.

From the Hancock Circuit Court.

J. B. Julian, J. F. Julian and S. Griffin, for appellants.

D. S. Gooding, J. A. New, J. W. Jones and M. B. Gooding, for appellee.

NIBLACK, J.—On the 27th day of April, 1882, Lucinda

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J. Harvey and eight others, claiming that they were owners in fee simple of an undivided one-half of a sixty-acre tract of land in Hancock county, and that Henry Fink was, in like manner, the owner of the other half, filed their complaint for partition, making Fink a defendant in the proceeding.

The defendant answered in denial as well as special matters in the nature of an estoppel in defence. He also, by way of cross-complaint, set up a claim for improvements made and taxes paid on the land.

Issues being formed both upon the complaint and cross-complaint, the plaintiffs obtained a verdict for one undivided half of the land and a judgment in partition on the verdict.

The record informs us that afterwards, at the October term, 1883, of the court below, the plaintiffs came by their attorneys, naming them, and that the defendant, also, came by his attorneys, likewise naming them; that the defendant thereupon filed his motion for a new trial; that the court, after being fully advised in the premises, granted a new trial to the defendant as of right; that, by agreement of parties then entered into, the issues in the cause were opened and the defendant was given leave to file an amended answer to the complaint, within a time limited, during the term. Before the close of the term the plaintiffs filed an amended complaint, and various proceedings were, from time to time, thereafter had in the formation of issues on the pleadings and in other matters looking to the preparation of the cause for another trial, when, on the 5th day of April, 1884, the plaintiffs entered a motion to vacate and set aside the order granting a new trial as of right, and all proceedings subsequent thereto, upon the ground that such order was made without their knowledge or consent, which motion was overruled by the court.

The defendant had, in the meantime, answered the amended complaint of the plaintiffs, in three paragraphs, to

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the third of which a demurrer was interposed, and overruled before issue was joined upon it.

At the June term, 1884, the cause was, by agreement, again submitted to a jury for trial, and the jury, after hearing the evidence, returned a general verdict for the defendant, with answers to numerous interrogatories submitted to them touching particular questions of fact. The plaintiffs thereupon moved the court to set aside the verdict and to grant a *venire de novo*, because the jury had not found on all the points or answered fully several of the interrogatories submitted to them, and because their findings were inconsistent, irreconcilable and incapable of enforcement. But, without further proceedings, the cause was permitted to stand continued until the ensuing October term, when, on the first day of that term, the motion for a *venire de novo* was overruled. The plaintiffs then moved for judgment in their favor upon the answers to the interrogatories, notwithstanding the general verdict, and that motion was likewise overruled.

On the fourth judicial day of said October term, the plaintiffs filed a motion for a new trial, assigning various and elaborately presented causes, to the filing and entry of which the defendant objected, and, at his suggestion, the motion was ordered to be struck from the files of the court, which was done accordingly, and a judgment on the verdict was entered in favor of the defendant.

Later in the term the plaintiffs asked leave to file a motion for a new trial, and affidavits in support thereof, and to have the motion then heard; but the desired leave was not granted, and the court declined to hear the motion.

On the 9th day of December, 1884, which was after the close of the October term of that year, the plaintiffs filed a new complaint against the defendant, in three paragraphs. The first paragraph was simply a complaint for a new trial, assigning some of the statutory causes and other special matters in support of the application, as in ordinary motions

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for a new trial. The second was, in its essential qualities, only a complaint for a review of the proceedings in the original cause. The third was an application for a new trial, seemingly addressed to the discretion of the court for relief against mistake, inadvertence, surprise and excusable neglect on the part of the plaintiffs, under section 396, R. S. 1881. Demurrers were sustained to all the paragraphs of this complaint, and the defendant had final judgment upon demurrer.

The plaintiffs below assign error here :

First. Upon the order granting the defendant a new trial as of right.

Second. Upon the refusal of the circuit court to vacate and set aside that order at a subsequent term.

Third. Upon the overruling of the demurrer to the third paragraph of the defendant's answer.

Fourth. Upon the striking out of their interlocutory motion for a new trial.

Fifth. Upon the refusal of the circuit court to enter judgment in their favor upon the facts as specially found, notwithstanding the general verdict.

Sixth. Upon the refusal of the circuit court to permit their second interlocutory motion for a new trial to be filed and heard.

Seventh. Upon the sustaining of the demurrers to the several paragraphs of the complaint for a review of the judgment and for a new trial.

As has been seen, the record shows that the plaintiffs were present, by their attorneys, when the order was made granting a new trial as of right, and neither interposed an objection nor reserved an exception. In contemplation of law, therefore, the order was made within their knowledge and, impliedly, with their consent. If the record does not speak the truth in reference to what occurred at that time it ought to have been corrected by proper proceedings in the court below. No question was, consequently, reserved on the order granting the new trial, and the circuit court did not err in

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afterwards refusing to vacate and set aside that order, upon the ground that it was made without the knowledge or consent of the plaintiffs, or upon any other ground disclosed by the record. The motion to vacate and set aside the order, at all events, came too late, as it belonged to a class of motions which must be entered at the earliest practicable moment to be made available. *Hutchinson v. Lemcke*, 107 Ind. 121.

No formal argument has been submitted against the sufficiency of the third paragraph of the defendant's answer, and, hence, the third specification of error presents no question which we are required to decide.

Under the civil code of 1852 a motion for a new trial was permitted only during the term at which the verdict or decision objected to was rendered; but the severity of that rule has been somewhat relaxed by the code of 1881, which provides as follows: "The application for a new trial may be made at any time during the term at which the verdict or decision is rendered, and if the verdict or decision be rendered on the last day of the session of any court, or on the last day of any term, then, on the first day of the next term of such court, whether general, special, or adjourned." R. S. 1881, section 561.

It is conceded that the verdict complained of in this case was returned on Thursday of the last week of the June term, 1884, and, as has been already stated, the motion for a new trial, which it is alleged the circuit court erroneously refused to entertain, was neither presented nor assumed to be filed until the fourth judicial day of the ensuing October term. This was beyond the time limited by the statute, and as the defendant objected to the filing of the motion at the time it was presented, the circuit court could not have then rightfully done otherwise than to refuse to entertain such a motion. The precise phraseology used in the expression of such a refusal was immaterial. We are, consequently, led to the conclusion that neither the fourth nor sixth specification of error is well assigned.

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We have no specific argument in support of the motion of the plaintiffs for judgment on the facts as found, notwithstanding the general verdict, and, hence, no enumeration of the facts relied upon as sufficient to have sustained that motion. In their motion for a *venire de novo* the plaintiffs claimed that the facts as found by the answers to the interrogatories were "inconsistent, irreconcilable and incapable of enforcement." But no specifications were at the time furnished in support of that criticism, and none of an opposing character have since been supplied in argument here. There has, consequently, been nothing brought to our attention affirmatively showing that the circuit court erred in overruling the motion for judgment notwithstanding the general verdict.

A complaint for a new trial, after the close of the term at which a cause has been finally disposed of, can only be filed where some sufficient cause or causes have been discovered since the term closed. R. S. 1881, section 563. The proceedings upon such a complaint become a separate and distinct action, and the ultimate result reached through such proceedings constitutes a final judgment from which an appeal may be prosecuted to this court. *Hines v. Driver*, 89 Ind. 339. Therefore, this appeal, which is primarily based upon the proceedings and judgment in the partition suit, does not properly bring before us for review the judgment rendered upon the complaint for a new trial. In that respect the case presented is one of a misjoinder of appeals. The same may be said, in general terms, of the paragraph constituting the complaint for a review of the proceedings and judgment in the original cause. But even more serious complications arise out of the joinder of that paragraph with the others demanding a new trial. That paragraph concluded with a prayer for a review of the proceedings set out by it, for errors of law committed during the progress of the cause in refusing to permit the plaintiffs to file and present their second application for a new trial and accompanying affida-

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vits, and in other respects particularly indicated and complained of. It was, therefore, a complaint for a review for alleged errors of law only.

For error of law apparent upon the record, a party may appeal to this court from the circuit court, or he may file a complaint for a review in the circuit court in which the record remains, but the adoption of one of these remedies waives the other. *Traders Ins. Co. v. Carpenter*, 85 Ind. 350, and authorities cited. When, therefore, the plaintiffs filed in the circuit court their complaint for a review, and prosecuted the proceeding thus instituted to final judgment, they precluded themselves from afterwards appealing to this court from the judgment sought to be reviewed. Their only remedy remaining was to appeal to this court from the judgment rendered against them upon their complaint for a review. A different rule prevails where a review is asked upon the ground of new matter discovered since the rendition of the judgment. *Hill v. Roach*, 72 Ind. 57.

The judgment is affirmed, with costs.

Filed June 16, 1887.

No. 12,898.

ALDERMAN v. NELSON ET AL.

ATTORNEY'S LIEN.—*Notice of Intention to Hold.*—*When Must be Entered.*—

Assignment of Judgment.—Under section 5276, R. S. 1881, an attorney does not acquire a lien upon a judgment obtained for a client, even as against subsequent assignees, unless notice of his intention to hold a lien is entered at the time the judgment of the trial court is rendered.

From the Allen Circuit Court.

J. Morris, J. M. Barrett and C. H. Aldrich, for appellant.

R. S. Robertson and J. B. Harper, for appellees.

ELLIOTT, J.—The appellant alleges in his complaint that,

111	255
132	472
111	255
138	181
111	255
147	139

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in September, 1881, Hiram Cobb recovered a judgment against him before a justice of the peace ; that from this judgment the appellant appealed to the circuit court, where judgment again went against him ; that this judgment was rendered on the 10th day of June, 1882 ; that an appeal was taken to the Supreme Court, and the judgment affirmed on the 19th day of April, 1884 ; that Messrs. Robertson and Harper were the attorneys for Cobb throughout the entire litigation, and on the 14th day of April, 1884, entered a notice of record that they held a lien on the judgment recovered by him ; that, in November, 1883, "Cobb became indebted to Charles R. Jennings in a large sum, and to secure the indebtedness as far as possible Jennings took in payment, to the amount of the judgment, the judgment against Alderman, but did not cause any formal transfer of record to be made to him ;" that, finding that a transfer was required, he procured one, on the 11th day of June, 1885, and that plaintiff settled the judgment with Jennings. It also appears from the statements of the complaint that Jennings knew, before he received any formal assignment of the judgment, of the claim and notice of Messrs. Robertson and Harper.

We have given a sufficiently full synopsis of the complaint to present the controlling question in the case, which is, was the lien of Messrs. Robertson and Harper, for their services as attorneys, taken in time to make it valid? This is the ruling question, for, if the lien is effectual, then, the assignment to Jennings of the judgment would not impair it. *Adams v. Lee*, 82 Ind. 587 ; *Puett v. Beard*, 86 Ind. 172 (44 Am. R. 280). On the other hand, if there was no valid lien, then the assignment to Jennings would be valid, although made after notice filed by Messrs. Robertson and Harper of their intention to hold a lien upon the judgment. It is obvious that if those gentlemen have no lien on the judgment, they can not disturb the settlement made between Cobb's assignee and the appellant, even though no consideration was paid for the assignment, and even though notice

of the claim for services had reached them before any assignment, legal or equitable, had been executed or agreed upon.

The judgment in the circuit court was not vacated or annulled by the appeal, but remained in full force, except so far as proceedings were stayed by a writ of supersedeas. *Central Union Tel. Co. v. State, ex rel.*, 110 Ind. 203. This was the judgment which gave Cobb a right to make his claim out of the property of Alderman, and this was the judgment upon which the lien must attach, if it attaches to any judgment at all, for the judgment of the Supreme Court simply affirmed that of the circuit court. The notice should be taken at the time the judgment it is intended to bind is rendered, and that is the judgment of the trial court. This is so held in *Day v. Bowman*, 109 Ind. 383, and is, we have no doubt, the correct rule. It can not have been the intention of the framers of our statute to leave the right to take a lien open pending the time allowed for appeal, or to leave it open during the time the case is in the Supreme Court on appeal; but, on the contrary, the evident intention was to require promptness in giving notice.

The statute gives the lien, and, to secure it, the statutory provisions must be pursued with reasonable strictness and accuracy. It may not be necessary to keep to the very letter of the statute, but it is necessary to keep within its spirit. We are constrained to hold in this instance, that the attorneys who claim the lien have not obeyed the letter or the spirit of the statute. It is there written: "That such attorney shall, at the time such judgment shall have been rendered, enter, in writing, upon the docket or record wherein the same is recorded, his intention to hold a lien thereon." R. S. 1881, section 5276. While it may be true that some latitude as to the time of filing the notice may be allowed, since it is apparent that the notice could not well be entered at the same instant the judgment is recorded, still, we think that the period intervening between June 10th, 1882, and April

Alderman v. Nelson *et al.*

14th, 1884, is far longer than the statute allows. To permit such a long delay would defeat one of the chief purposes of the statute, and no reasonable construction of its words will permit the conclusion that a delay of many months will not impair the lien, unless rights have been acquired in the meantime. Our decisions, as we think, give the statute a very different construction from that which the theory of the appellees requires. *Day v. Bowman, supra; Puett v. Beard, supra.*

It is argued with much ability, and some plausibility, that the omission to enter the notice at the time the judgment is rendered only defeats the lien as to those who acquired rights prior to the time the notice was given; and it is said that the case falls within the rule that a conveyance not recorded within the time prescribed by law is nevertheless good as to those who acquire rights after it is recorded. The fallacy in this position is in assuming that the two classes of cases are the same in principle. They are not the same, for the conveyance is valid between the parties without recording, and the purpose of recording is to give notice, not to validate the deed; while in the case of a lien, notice is essential to the existence of the lien itself, as it is only by virtue of the statute that a lien can exist. *Hill v. Brinkley*, 10 Ind. 102. Notice is an indispensable element of the lien, for without notice there can be no lien.

This case is much more closely analogous to the case of a mechanic's lien than it is to the case of a mortgage. The lien of a mortgage grows out of a contract, while the lien of a mechanic, like that of an attorney, is of purely statutory creation. It would hardly be contended that a mechanic could enforce a lien against any one unless he had given the notice required by law; and the same principle that governs the case of a mechanic's lien must govern the case of an attorney's lien.

It is not necessary to inquire whether an attorney had a lien on his client's judgment at common law, for the statute

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covers the entire subject and creates the lien, and that is the only one that can be enforced. It was undoubtedly within the power of the Legislature to abrogate a rule of the common law, so that, if it were conceded that the lien existed at common law, it would not avail the appellees. The statute is now the source from which the lien is derived, and it can only exist as the statute creates it.

The case is before us on the complaint, and we can not presume that there was bad faith on the part of the appellant. That, if available at all, must be pleaded as a defence.

Judgment reversed.

Filed June 16, 1887.

111	250
124	213
124	474

No. 12,377.

THE CINCINNATI, HAMILTON AND INDIANAPOLIS RAILROAD COMPANY v. JONES.

RAILROAD.—*Bridge Abutting on Highway.*—*Fence.*—*Stock.*—While a railroad company is not required to fence its track, or to maintain cattle-pits, at points where to do so would interfere with the safety of its employees in operating trains, or where fences or cattle-pits would interfere with its rights or with the rights of the public in travelling or doing business with the company, yet the burden is upon the company to show that, in constructing and maintaining a bridge abutting upon a highway, it had adopted all reasonable and practicable precautions to keep animals from entering upon the bridge from the highway; and it does not alter the case that the bridge may have been partially in the highway, or that the animal may have been struck while upon that part of the bridge extending into the highway, on ground appropriated by the company.

SAME.—*Securely Fenced.*—Where, in the absence of a showing that it is reasonably impracticable to do otherwise, a railroad company maintains a bridge in such a condition that animals may enter upon it from a public highway, thus putting in jeopardy the safety of trains as well as the lives of the animals, the railroad is not securely fenced.

SAME.—*Evidence.*—*Hypothetical Question.*—In an action against a railroad company for killing a mare, it is not error to permit the following ques-

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tion to be answered: "Suppose 'Little Miss' (the mare) was in as good condition, sound in wind and limb, at the time she was killed in October, 1884, if she was killed then, as she was when you knew her last, then I will ask you to state what was her fair market value;" especially so where counsel apprise the court that if they do not maintain the hypothesis upon which the question is put, the evidence shall be struck out.

SAME.—Race-Horse.—General Reputation.—In such case, evidence of the general reputation of the mare among horsemen and turfmen, with reference to her being rattle-headed or disposed to break when racing, is not admissible.

SAME.—Practice.—Witness.—Where it does not appear from any statement in the record what a witness would have testified to in answer to an interrogatory, the sustaining of an objection presents no question on appeal.

From the Rush Circuit Court.

R. D. Marshall and *J. W. Study*, for appellant.

B. L. Smith, *W. J. Henley*, *C. Cambern* and *T. J. Newkirk*, for appellee.

MITCHELL, J.—This was a suit to recover the value of a mare alleged to have been struck and killed by the appellant's engine and train of cars, on the 18th day of October, 1884. The complaint charged that the railroad was not securely fenced at the place where the animal went upon the track. The issue was made by a general denial. There was a trial, verdict and judgment for \$3,500.

It is urged on behalf of the appellant, that the verdict is not sustained by the evidence.

The railroad company rested its defence mainly upon the proposition that it was under no legal obligation to maintain a fence at the place where the animal entered upon its track.

It appears from the evidence, that the appellant's line passes east and west through the city of Rushville. A short distance east of the east boundary of the city limits the railroad intersects a highway, known as the Michigan road, which runs north and south. At the point of intersection, and for some distance either way, the highway runs parallel with and along the west bank of a race or watercourse, over

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which the railway track is laid upon a wooden bridge, some sixty feet in length. The west end of the bridge is on a level with the highway, and within the highway limits, not more than seven feet distant from the travelled track. The width of the highway at the point of intersection, counting from the west end of the bridge, is but twenty-seven feet. The railway bridge was covered with plank or cross-ties, three inches thick, and about nine inches wide, laid from two to two and a half inches apart. Guard-rails designed to afford protection to engines and cars, in case of derailment, were placed at suitable distances from the rails of the main track, and the evidence tended to show that the security of trains, in case of derailment on the bridge, rendered it necessary to place the cross-ties close together. As a means of deterring animals from going upon the bridge, two cross-ties had been omitted or taken out, one about three and the other about five feet from the west end. Whether any more effective means for that purpose could have been employed, with a due regard for the safety of trains and employees, does not seem to have been the subject of any testimony one way or the other. The railroad company relies upon what it claims to have established as the fact, that the west end of the bridge extends necessarily into the highway limits, and that the animal when struck, although upon the west end of the bridge, was, nevertheless, within the bounds of the highway. The company claims further, that a cattle-guard could not have been constructed to the westward of the bridge without encumbering the highway and rendering travel thereon dangerous. It appears that the plaintiff's mare escaped from a pasture-field, and, passing along the highway, entered upon the west end of the bridge, where she was struck by an engine about five o'clock in the morning. There was evidence from which the jury may have believed that the animal had passed over the openings in the west end of the bridge, and that she had turned westward, and was trying to escape to the highway, when struck by the engine. Other evidence

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tended to show that she had fallen into the openings and was struggling to extricate herself when the engine came upon her. Since there seems to have been no dispute but that the west end of the bridge was substantially in the highway, it is made reasonably clear that the railroad company could not lawfully have placed a cattle-pit to the westward of the bridge. The highway ran parallel with and along the margin of the race. A fence could have served no useful purpose, and as there was only seven feet between the west end of the bridge, which was in the highway, and the travelled track, to have placed a cattle-pit there would have been manifestly an unlawful and dangerous obstruction in the highway.

It is abundantly settled that a railroad company is not required to fence its track nor to maintain cattle-pits at points where to do so would interfere with the safety of its employees in operating trains upon the road, or where fences or cattle-pits would interfere with its rights in the transaction of business with the public, nor where the rights of the public in travelling or doing business with the company would be interfered with. When animals enter upon railroad tracks at such places and are killed within limits that can not and are not required to be fenced, the company is not liable under the statute. *Indiana, etc., R. W. Co. v. Quick*, 109 Ind. 295; *Indiana, etc., R. W. Co. v. Sawyer*, 109 Ind. 342; *Fort Wayne, etc., R. R. Co. v. Herbold*, 99 Ind. 91.

The company did not, however, make its defence complete, by showing that it could not maintain a fence or cattle-pit in the highway. The location of its bridge was such that it was necessary that it should have been so constructed as to prevent animals from entering upon it; or, if this was impracticable, the fact should have been made to appear.

While courts may say as matter of law that railroad companies can not be required to erect fences or construct cattle-pits in public highways, courts can not judicially know that a railroad bridge abutting upon a highway may not reasonably be so constructed as to deter animals from entering

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thereon, and yet be secure for the passage of engines and trains. If, with reasonable skill and care, a railroad bridge so situate can be so constructed and maintained as to prevent animals from entering upon it, and yet be safe for the business of the company, a due regard for the safety of trains and those travelling upon them, as well as for the safety of animals, imposes the duty upon the company of exercising the degree of care and skill required to construct and maintain such a bridge. As has been observed before, we find no evidence upon this subject. The burden was upon the company to show that it had adopted all reasonable and practicable precautions to keep animals from entering upon the bridge from the adjacent highway. *Cincinnati, etc., R. W. Co. v. Parker*, 109 Ind. 235; *Louisville, etc., R. W. Co. v. Clark*, 94 Ind. 111; *Louisville, etc., R. W. Co. v. Shanklin*, 94 Ind. 297.

Until it appears that it is reasonably impracticable to construct bridges with cattle-guards, we are constrained to hold that where a railroad company maintains a bridge in such a condition that animals may enter upon it from a public highway, thus putting in jeopardy the safety of trains, as well as the lives of the animals, the railroad is not securely fenced. *Louisville, etc., R. W. Co. v. Porter*, 97 Ind. 267; *Evansville, etc., R. R. Co. v. Barbee*, 74 Ind. 169.

It does not alter the case that the bridge may have been partially in the highway, or that the animal may have been struck while upon that part of the bridge which extended into the highway limits. If the railway company appropriated part of the highway to the purpose of maintaining its bridge, and left its structure in such a condition that animals could enter upon it, the company will not be heard to say that animals killed upon the bridge were killed within the limits of the highway. After the railway company converted part of the highway to the support of its railway bridge, that part of it which was occupied by the bridge, and the tracks thereon, could not be regarded as part of the highway.

At the trial the plaintiff was permitted, over the objection

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of the appellant, to ask the following question: "Suppose 'Little Miss' was in as good condition, sound in wind and limb, at the time she was killed in October, 1884, if she was killed then, as she was when you knew her last, then I will ask you to state what was her fair market value."

It was not error to permit the question to be answered, especially as the record in that connection indicates that counsel for plaintiff apprised the court that if they did not maintain the hypothesis upon which the question was put the evidence should be stricken out. *City of Indianapolis v. Scott*, 72 Ind. 196; *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Nave v. Tucker*, 70 Ind. 15.

Until the contrary appears, we must assume that other evidence was given in support of the hypothesis upon which the question rested, or that it was withdrawn from the jury.

Rulings made by the court in respect to admitting and excluding evidence upon various subjects connected with the condition of the animal at the time she was killed, in respect to her market value at Rushville, if withdrawn from the race-course, whether or not she had been the loser in races, and as to her comparative value with another animal named, are the subjects of comment by counsel. Without going into details upon these subjects, it is sufficient to say that we have considered the questions presented and have found no error in the rulings of the court.

The value of the animal as a broodmare came in question at the trial, and the appellant asked a witness what one of her colts, which had been sold some years before, brought at a public sale at or near the city of Rushville. The court sustained an objection to the question. It does not appear from any statement in the record what the witness would have testified to in answer to the question put. No question is, therefore, presented for consideration. *Higham v. Vanosdol*, 101 Ind. 160.

Questions were asked by the appellant in reference to the general reputation of the mare among horsemen and turfmen

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“with reference to her being ‘rattle-headed’ or disposed to break” when racing. These were questions of fact, to be proved by persons acquainted with the performances of the animal upon the track. We are not directed to any authority, and we know of none, which sustains the claim that the general reputation of the animal was admissible in evidence.

Numerous other questions relating to rulings upon the evidence are discussed. We have examined them, and find no error.

The questions growing out of the refusal to give certain charges asked by the appellant have been considered and disposed of by what has already been said upon the subject of the duty of the railroad to maintain its bridge in such a condition as to prevent animals from going upon it.

The instructions asked and refused proceeded upon the assumption that if the animal entered upon the railroad track at a public crossing, or if the west end of the bridge extended into the highway, so that no cattle-pit could have been maintained therein, or if the animal was killed on the bridge within the limits of the highway, then in either case no recovery could be had by the plaintiff. As has already been seen, neither of the foregoing theories, without more, is maintainable. There is evidence which sustains the amount assessed by the jury.

Under the well settled rule we can not disturb a verdict upon what we might suppose to be the weight or preponderance of evidence. The instructions of the court put the case fairly to the jury. There was no error.

Judgment affirmed, with costs.

Filed May 23, 1887; petition for a rehearing overruled June 16, 1887.

The Continental Life Insurance Company v. Houser.

No. 12,798.

THE CONTINENTAL LIFE INSURANCE COMPANY v. HOUSER.

LIFE INSURANCE.—*When Premiums can not be Recovered.*—Where a risk once attaches, under a valid policy, premiums paid upon it during its continuance can not be recovered back as for money had and received.

LAW OF CASE.—*Decision of Supreme Court.*—The decision of the Supreme Court in a cause remains the law of the case in all subsequent proceedings.

From the Vigo Circuit Court.

J. Buchanan, for appellant.

W. Eggleston and *E. Reed*, for appellee.

HOWK, J.—This cause is now before this court for the second time. On the former appeal, the opinion and judgment of this court are reported under the title of *Continental Life Ins. Co. v. Houser*, 89 Ind. 258.

When the cause was returned to the court below, appellee filed an amended complaint, in four paragraphs. Of these, appellant's demurrer was sustained to the second paragraph, and appellee voluntarily withdrew the third paragraph of her complaint. Issues were joined on the first and fourth paragraphs of complaint by appellant's answer in general denial thereof. These issues were tried by a jury, and a verdict was returned for appellee assessing her damages in the sum of \$593.75; and, over appellant's motion for a new trial, the court rendered judgment on the verdict.

Errors are assigned here by appellant, which call in question (1) the sufficiency of the first paragraph of complaint when challenged, for the first time, in this court; (2) the overruling of its demurrer to the fourth paragraph of complaint, and (3) the overruling of its motion for a new trial.

1. It is conceded by appellant's counsel, in his brief of this cause, that the first paragraph of appellee's complaint, now before this court, is the same substantially as her third paragraph of complaint on the former appeal herein. We

111	266
125	89
136	488

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then held that such third paragraph, "although badly drawn and lacking in certainty," was sufficient on demurrer as an "ordinary count for money had and received." If the paragraph is sufficient on demurrer, and our former holding is conclusive that it is, surely it is sufficient when, as here, it is called in question for the first time by an assignment of error in this court.

2. Appellant's counsel vigorously assails, in argument, the overruling of the demurrer to the fourth paragraph of appellee's complaint. Appellee's counsel claim, however, that if this ruling be erroneous, it is a harmless error for the reason that the court below "excluded all evidence offered under the fourth paragraph of complaint." This is equivalent, we think, to an admission on the part of appellee that the verdict and judgment below herein rest, and must be rested, upon the first paragraph of appellee's complaint. Besides, the fourth paragraph of complaint, now before us, states substantially the same facts as were stated in the fourth paragraph of complaint on the former appeal herein, the substance of which facts we have given in our former opinion. We then held, and we see no cause for changing our decision, that the facts so stated were not sufficient to withstand a demurrer, and that the paragraph of complaint was not "good for any purpose or upon any theory." In the case under consideration, the court clearly erred, we think, in overruling appellant's demurrer to the fourth paragraph of appellee's complaint.

3. In our opinion, on the former appeal herein, we said: "The policy was valid in its inception, and there was for a time a risk, and the general rule is that where the risk attaches premiums can not be recovered from the company. Bliss Life Ins. 750; May Ins., section 567. If there was a continuing valid risk up to the time the last premium was tendered and refused, then the premiums previously paid can not be recovered. May Ins., sections 568 and 569." We

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think this is a correct statement of the law, and certainly it is the law of this case. For the rule of law applied by this court in the decision of a cause remains the law of that case in all subsequent proceedings therein. *Kress v. State, ex rel.*, 65 Ind. 106; *Pittsburgh, etc., R. W. Co. v. Hixon*, 110 Ind. 225, and cases there cited.

Applying the rules of law declared in our opinion on the former appeal herein to the case as now presented, we are of opinion that the verdict and judgment below can not possibly be sustained. There is no evidence in the record of this cause, as now presented, which proves, or tends to prove, that appellant ever had and received any money, for the use and benefit of appellee, upon any account other than premiums paid upon a valid risk assumed by appellant upon the life of Louise Hesse. Under the law of this case, as declared by this court on the former appeal herein, such premiums so paid can not be recovered back from the appellant as and for money had and received. It follows, therefore, that the verdict of the jury was not sustained by sufficient evidence and was contrary to law; and, for these causes, it was error in the court below to overrule appellant's motion for a new trial. This is not a case of conflicting evidence. But it is a case where the evidence wholly fails to establish a valid and legal claim against the defendant.

Appellant's counsel also complain, in argument, of certain alleged errors of law occurring at the trial and excepted to, and assigned as causes for a new trial in the motion therefor; but, as these errors of law are not likely to occur again, we do not now consider them. In conclusion, we commend to the consideration of appellee and her counsel the suggestions contained in the closing sentences of our opinion on the former appeal herein, and the authority cited in support thereof. *Day v. Connecticut, etc., Ins. Co.*, 45 Conn. 480; *Continental Life Ins. Co. v. Houser, supra*.

The judgment is reversed, with costs, and the cause remanded with instructions to sustain the demurrer to the

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fourth paragraph of complaint, and for further proceedings not inconsistent with this opinion.

Filed June 17, 1887.

No. 12,887.

RENNER ET AL. v. ROSS, ADMINISTRATOR.

PARTIES.—Practice.—Supreme Court.—Waiver.—Where one is made a party defendant to an action, who is neither a necessary nor a proper party thereto, the plaintiff can not be heard to object to his right to assail the complaint or petition by assignment of error in the Supreme Court on appeal.

DECEDENT'S ESTATE.—Administrator.—Sale of Real Estate.—Petition.—An administrator is allowed to sell land for the purpose of making assets only in case of necessity, and in his petition for an order of sale he must state facts clearly showing that such necessity exists.

SAME.—Will.—Widow's Statutory Allowance.—Election by Widow.—A petition by an administrator for an order to sell the real estate of the decedent to make assets for the payment of the widow's statutory allowance, which shows that there is a will, but does not show whether or not the widow has elected to take under its provisions, is insufficient.

From the Fayette Circuit Court.

C. A. Murray, J. M. McIntosh and *C. Roehl*, for appellants.

R. Conner and *H. L. Frost*, for appellee.

ELLIOTT, J.—The appellee filed the petition on which the proceedings set forth in this record are founded, asking that the land of which his decedent died the owner be sold for the payment of debts due from his estate.

David J. Renner was made a party to the petition by the appellee, and joins in the assignment of errors with his wife, Mary A. Renner, one of the heirs of the decedent, and it is argued by the appellee's counsel, that, as he was neither a proper nor a necessary party to the proceeding, he had no right to join in an attack upon the petition. The appellee's

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position is not tenable. By his voluntary act he made David J. Renner a party, and he can not now be heard to allege that he was not a proper party. Having brought Renner into court as a party, the appellee has no right to complain because Renner defends as a party. The appellee can not be allowed to occupy inconsistent positions.

There was no error in overruling the motion to make the petition more specific. This motion asked that the petition be made to show "what portion of the real estate is liable to be made assets," and as the petition stated the facts that was a question of law. It was not necessary for the petitioner to make his petition more specific than the statute requires, and that only requires a concise statement of the facts. Counsel argue the question as if the motion required the court to compel the petitioner to show whether the widow had elected to take under the law or under the will, but this is not the question presented by the motion.

The petition shows that the only claim for which it is necessary to sell the real estate is that of the widow. On that point the allegations of the petition are these: "That there are no debts of said estate except the costs of this administration and the \$500 given the widow by statute, unless Mary A. Renner files claims against said estate for the expenses of the last sickness, and funeral expenses, which were paid by her; that if the widow elects to take under the provisions of the will, all of said real estate, except the life-estate of said widow, is liable to be made into assets for the payment of said debts, and the part thus liable is of the probable value of \$1,500; that if said widow does not elect to take under the provisions of said will, then the undivided two-thirds of said real estate is liable to be made into assets."

It is insisted that the petition does not state facts sufficient to entitle the appellee to an order for the sale of the property, because, for aught that appears, the widow may have elected to take under the will, and thus have relinquished her right to the statutory allowance.

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In *Langley v. Mayhew*, 107 Ind. 198 (6 N. E. R. 317, and note), it was held that the allowance will be released by the widow's election to take under an inconsistent provision of her husband's will, and if there was such a provision in the will of the husband of Ann Vietor there was no necessity for selling the real estate. It is a settled doctrine of the law that resort can only be made to the real property in a case of necessity. *Cole v. Lafontaine*, 84 Ind. 446, and cases cited; *Jackson v. Weaver*, 98 Ind. 307; *Scherer v. Ingerman*, 110 Ind. 428. We think it the duty of the administrator who seeks to compel the sale of real estate to state facts showing the necessity for resorting to it.

If the petition before us can be regarded as showing a necessity for resorting to the real estate, it should be upheld; otherwise it should be condemned. It seems to us that the petition does not show the existence of this necessity. It is not averred that the widow made an election, nor that she has not, but it is left in doubt as to what course she may pursue, so that it can not be said that there is any necessity for resorting to the land to pay her claim. It is true that in many cases the presumption, in the absence of countervailing facts, is, that the widow took under the law. *Wetherill v. Harris*, 67 Ind. 452. But we do not think this presumption can prevail where the administrator seeks to take the land from the heir and sell it to pay the widow's allowance, under section 2491 of the Revised Statutes. In such a case the duty of affirmatively showing that it is necessary to take the land devolves upon the administrator. He has no right to invoke the benefit of this presumption.

In this case the petition can only be sustained by making one of two important presumptions against the heir, and that, we are clear, the law will not warrant us in doing.

The general statement that if the widow elects to take under the will, then, all of the land subject to her life-estate is liable, is but the pleader's conclusion. Whether the land is liable depends upon the provisions of the will and the

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course pursued by the widow. If she elected to take under the will, then it may be that she released her right to the statutory allowance. *Langley v. Mayhew, supra.*

Whether she did release her right to the allowance depends upon the facts, and is a conclusion of law to be drawn by the court. It was the duty of the pleader to state the facts, and not the conclusions of law. Looking to the facts, it can not be said that any necessity is shown for resorting to the land.

Judgment reversed.

Filed June 21, 1887.

111	272
123	53
123	530
111	272
128	84
128	386
111	272
131	236
133	33
111	272
136	177
111	272
146	93
111	272
155	162
111	272
160	449

No. 12,570.

THOMPSON v. LOWE.

PARTNERSHIP.—*Adjustment of Partnership Accounts.*—*When One Partner May Maintain Action.*—As a general rule, no action can be maintained by one partner against the other respecting particular items of account pertaining to the partnership business until the accounts of the partnership are finally adjusted, or until the affairs of the firm are so far settled as that nothing remains except to ascertain the final state of the account between the partners.

SAME.—*Sale of Partner's Interest.*—*Promissory Note.*—*Set-Off.*—Where one partner transfers his interest in the assets, including the books and accounts of the partnership, to a continuing member of the firm, or to another, and receives in payment for such interest the note of the purchaser, the maker of the note can not set off an account apparently due the firm from the member whose interest was transferred.

SAME.—A sale by a partner of his interest in the assets of a firm does not, in the absence of a special agreement to that effect, imply that the purchaser becomes entitled to collect from the seller what may appear to be due from him on the firm books.

SAME.—The effect of such a sale is to transfer to the purchaser whatever interest the seller has in the assets of the partnership after the payment of all the partnership liabilities, and, in the absence of anything to show to the contrary, it will be presumed that the account of the retiring member was adjusted in ascertaining the value of his interest, and

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that the value was increased or diminished in proportion as he was found the debtor or creditor of the firm.

SAME.—Promissory Note Executed by Firm to Member.—A note governed by the law merchant, payable by a firm to one of its own members, may be enforced against the firm, if endorsed to an innocent holder before maturity, regardless of the state of the account of the member to whom it was made payable. But such note in the hands of one who stands in the place of the original payee can not be made the basis of an action at law against the firm, or the remaining partners, it being nothing more than an acknowledgment that the partner named therein had paid into the firm either in property or money the amount specified in the note.

PRACTICE.—Appeal.—Reversible Error.—Overruling Demurrer to Bad Answer.—The overruling of a demurrer to a bad answer is a reversible error, even though there be other good answers under which the same evidence is admissible.

From the Shelby Circuit Court.

T. B. Adams, L. T. Michener, B. F. Love, A. Major and H. C. Morrison, for appellant.

J. S. Scobey, E. K. Adams and L. J. Hackney, for appellee.

MITCHELL, J.—This suit was to recover the amount of a promissory note, bearing date May 11th, 1874, calling for eight hundred dollars, and interest, executed by W. W. Lowe & Co., and payable to O. M. Thompson. At the time the note was executed the firm of W. W. Lowe & Co. was composed of William W. Lowe, Oliver M. Thompson and Daniel M. Lovett. The payee of the note was one of the partners. After the execution of the note, Lovett transferred his interest in the partnership assets to Lowe & Thompson, the latter assuming all the partnership debts. Subsequently, Lowe & Thompson dissolved partnership, Lowe agreeing to take all the books and accounts of the firm, and to assume and pay all the partnership debts. Thompson was to receive certain property in lieu of his interest. Thompson assigned the note in suit to the plaintiff, Alfred Thompson.

The complaint sets out the foregoing, among other facts, and alleges that the note, which is payable at a bank in this State, was assigned by endorsement to the plaintiff before

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maturity, and that Lowe, by reason of his agreement to pay all the partnership debts, is primarily liable for the payment of the note.

In his seventh paragraph of answer, Lowe set up that the note sued on was assigned to the plaintiff after maturity, and that prior to the execution and assignment of the note, Thompson, the payee, was indebted to the firm of W. W. Lowe & Co. to the amount of fourteen hundred dollars, for the balance due for his share of the capital of the firm, which amount, it was alleged, remained due and unpaid. The answer alleged further, that Thompson had become indebted to the firm of Lowe & Thompson to the amount of eight hundred and ninety-eight dollars, for money paid by the firm to one King, on account of a debt due the latter from Thompson. These several sums, it is alleged, remained due and unpaid to the several firms at the time the latter transferred his interest in the partnership property and books and accounts to Lowe. It is averred that Lowe became the owner of these debts, owing by Thompson, by the transfer of the books and accounts by the latter to the former under the terms of the articles of dissolution.

This answer is assailed on the ground that it does not appear therefrom that the partnership affairs had been settled up and adjusted. The argument is, that the indebtedness of Thompson can not be set off against the note in suit, until it does so appear.

It is undoubtedly true as a general rule, that until the accounts of the partners are finally adjusted, or until the affairs of the firm are so far settled as that nothing remains except to ascertain the final state of the account between the partners, no action can be maintained by one partner against the other in respect to particular items of account pertaining to the partnership business. Courts will not ordinarily entertain matters relating to partnership accounts between partners, until by its judgment or decree a final adjustment of the partnership business can be effected. *Lang v. Oppen-*

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heim, 96 Ind. 47; *Warring v. Hill*, 89 Ind. 497; *Meredith v. Ewing*, 85 Ind. 410; *Coleman v. Coleman*, 78 Ind. 344; *Crossley v. Taylor*, 83 Ind. 337; *Page v. Thompson*, 33 Ind. 137; *Briggs v. Daugherty*, 48 Ind. 247.

It may be taken as settled, too, that where one partner transfers his interest in the assets, including the books and accounts of the partnership, to a continuing member of the firm, or to another, and receives in payment for such interest the note of the purchaser, the maker of the note can not set off an account apparently due the firm from the member whose interest was transferred. A sale by a partner of his interest in the assets of a firm, does not, in the absence of a special agreement to that effect, imply that the purchaser becomes entitled to collect from the seller what may appear to be due from him on the firm books. *Over v. Hetherington*, 66 Ind. 365; *Hasselman v. Douglass*, 52 Ind. 252. The effect of such a sale is, to transfer to the purchaser whatever interest the seller has in the assets of the partnership after the payment of all the partnership liabilities. In the absence of anything to show the contrary, it will be presumed that the account of the retiring member was adjusted in ascertaining the value of his interest, and that the value was increased or diminished in proportion as he was found the debtor or creditor of the firm. Where the purchaser agrees to pay the partnership liabilities, and also to pay the retiring partner a specified sum for his interest, the presumption will be, until the contrary appears, that the debts were ascertained, and that the sum agreed to be paid was the value of the retiring partner's interest, and that this included the adjustment of his own account with the firm, whether by such account he appeared to be debtor or creditor. *Roberts v. Ripley*, 14 Conn. 543.

The feature of this case, which distinguishes it from the cases cited, and from those which fall within the general rule, is that the note sued on was executed by the firm of W. W. Lowe & Co. to one of its own members. The complaint avers that the note was endorsed to the plaintiff before ma-

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turity. The answer under consideration, however, alleges that the transfer and endorsement of the note were not made until long after it had matured. This being conceded by the demurrer, it follows that any defence which would have been available as against the payee, is equally available against the plaintiff. A note governed by the law merchant, payable by a firm to one of its own members, may be enforced against the firm if endorsed to an innocent holder before it is dishonored. *Union Nat'l Bank v. Bank of Commerce*, 94 Ill. 271; *Kipp v. McChesney*, 66 Ill. 460; *Davis v. Briggs*, 39 Maine, 304; *Roberts v. Ripley*, 14 Conn. 543; *Walker v. Wait*, 50 Vt. 668; *Beacannon v. Liebe*, 11 Or. 443; *Pitcher v. Barrows*, 17 Pick. 361; *Thayer v. Buffum*, 11 Met. 398.

A note so issued and endorsed will be deemed to be a debt or liability of the firm, and will be enforceable in the hands of a *bona fide* holder and owner, regardless of the state of the account of the member to whom it was made payable.

Such a note, however, in the hands of one who stands in the shoes of the original payee, can not be made the basis of an action at law against the firm or the remaining partners. As was said by SHAW, C. J., in *Stoddard v. Wood*, 9 Gray, 90, "The difficulty of maintaining an action by a partnership against one partner is not merely a matter of parties, arising out of the difficulty of bringing suit; it lies much deeper. A promise by a partner to the partnership is a promise to pay himself with other persons; and it can not be said that anything is due until the whole is settled, until all the assets are collected, and all debts paid. Until then, it can not be known whether there is any balance due; still less, what that balance is."

The case cited is in no respect different in principle from that under consideration. In that case one partner had given his note to the firm as evidence of sums of money drawn out by him. Afterwards he sold and assigned his interest in the assets of the firm, including notes, accounts and other rights and credits. It was held that the assignment did not include

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the note given by himself, that not being a debt due the partnership on which an action would lie, but, in effect, a mere certificate that the maker owed the firm so much money. The application of the principle which ruled in the case cited to the facts before us, leads to the conclusion that the agreement of Lowe to pay the partnership debts, did not include the note given by the firm to one of the partners, unless that note was then held by one in favor of whom it was enforceable against the firm.

As between the partners, the note was in effect nothing more than an acknowledgment that the partner named therein had paid into the firm, either in property or money, the amount specified in the note. The giving of the note in the name of the firm, did not isolate the transaction to which it related so as to take it out of the dealings or accounts of the firm. The transaction pertained to the partnership account, to be adjusted with other matters relating to the firm business in all respects as if no note had been given. The payee could have maintained no suit at law upon the note. *Davis v. Merrill*, 51 Mich. 480; *Tipton v. Nance*, 4 Ala. 194; *Couilliard v. Eaton*, 139 Mass. 105; *Decreet v. Burt*, 7 Cush. 551; *Houston v. Brown*, 23 Ark. 333.

Since the payee could not have maintained a suit at law upon the note, neither can his assignee who stands on no better ground. Section 5503, R. S. 1881; *Green v. Louthain*, 49 Ind. 139; *Learned v. Ayres*, 41 Mich. 677; *Hill v. McPherson*, 15 Mo. 204.

The controversy seems to involve but a single question, and that is, whether or not the note was assigned before maturity to an innocent holder for value. If it was so endorsed, the matters pleaded as a set-off are not available. If it was not, no action at law can be maintained upon the note.

The answer under consideration proceeds upon the theory that the note was endorsed after maturity, and that hence certain matters of account apparently due from Thompson to the firm of Lowe & Thompson were available as a set-off.

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Upon the theory that the matters pleaded were a proper set-off, the answer is not well pleaded. If the note had been of a character to be enforceable against the firm, and hence one of the liabilities included in the agreement of Lowe, the items of account of Thompson were not subject to be set off against it. If the note was not assigned until after it was dishonored, the facts showing how it was given having been stated in the complaint, it was only necessary to answer that it was so assigned in order to defeat the plaintiff's right to maintain the action.

The answer alleged that the note was not assigned until after maturity. If it had been pleaded upon the theory of making that defence, it would have been a sufficient answer. The judgment must, however, be reversed.

There were other answers to which demurrers were overruled, which proceeded upon the theory that certain other items of account due from Thompson to the firm of Lowe & Thompson were proper matters of set-off. These answers did not allege that the note in suit was transferred after maturity. They were, therefore, clearly insufficient upon any theory. The overruling of a demurrer to a bad answer is reversible error, even though there be other good answers under which the same evidence is admissible. *Epperson v. Hostetter*, 95 Ind. 583, 587; *Over v. Shannon*, 75 Ind. 352; *Sims v. City of Frankfort*, 79 Ind. 446; *Abdil v. Abdil*, 33 Ind. 460.

As has already been seen, when Lowe purchased the interest of Thompson in the firm of Lowe & Thompson, and agreed to pay the firm debts, and transferred to Thompson certain property in lieu of his interest in the firm, it must be presumed, until the contrary appears, that all matters relating to the state of the latter's partnership account, both in respect to any indebtedness of his to the firm and to any liability of the firm to him, were adjusted in fixing the value of his interest. The note in Thompson's hands, or in the hands of any one who took it after maturity, constituted nothing more than a matter pertaining to the

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partnership account. The account, including the note, must be deemed to have been so far adjusted as that, except in some equitable proceeding looking to a readjustment of the whole partnership account upon some sufficient ground, the note can not now form the basis of an action at law, unless it be in the hands of an innocent holder. If it is so held, the state of the partnership account can not be made a matter of defence.

What has preceded renders it unnecessary that we should consider other questions discussed.

The judgment is reversed, with costs, with directions to the court below to sustain the demurrers to the amended sixth, and to the seventh, eighth and ninth paragraphs of answer and to give leave to the parties to reform the issues, and for further proceedings not inconsistent with this opinion.

Filed June 16, 1887.

No. 13,827.

TAYLOR v. THE STATE.

CRIMINAL LAW.—Rape.—Penetration.—Under the statute, section 1806, R. S. 1881, the slightest penetration, the other elements of the crime being present, is sufficient to constitute rape.

SAME.—Circumstantial Evidence.—Penetration, like any other element of crime, may be established by circumstantial evidence.

From the Knox Circuit Court.

W. A. Cullop and *G. W. Shaw*, for appellant.

L. T. Michener, Attorney General, *J. C. Adams*, Prosecuting Attorney, and *J. H. Gillett*, for the State.

ELLIOTT, J.—The appellant was convicted of the crime of rape upon the person of Jane Taylor, a child nine years of age. It is contended by his counsel that the verdict is not supported because there is no evidence of penetration.

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Our statute provides that "In prosecutions for the offence of rape, proof of penetration shall be sufficient evidence of the commission of the offence." R. S. 1881, section 1806. Under this statute, however it may have been at common law, the slightest penetration of the genital organ of the male into that of the female is sufficient, the other elements of the crime being present, to establish guilt. *Brauer v. State*, 25 Wis. 413; *State v. Tarr*, 28 Iowa, 397; Bishop Statutory Crimes, section 488.

The rule prescribed by our statute is a sound one, and its efficiency should not be impaired by limiting its scope and effect. There was much reason for the censure so often passed upon the rule declared by some of the common law judges. In commenting upon some of the later cases the authors of a recent work on medical jurisprudence justly say: "In our opinion this is not only good law, but common sense. That a scoundrel who attempts the chastity of a child or a young girl should escape punishment merely because her youth, or the imperfect development or narrowness of the parts prevent his fully consummating the crime, appears to us as undesirable as it would be unjust." Woodman & Tidy Forensic Medicine and Toxicology, 640.

"The jury," says Mr. Bishop, "may infer the penetration from circumstances, without direct proof." Bishop Statutory Crimes, section 488. Discussing the same question, the Supreme Court of Iowa said: "Nor is the prosecution bound to show the fact of actual penetration by the prosecutrix herself." *State v. Tarr, supra*.

But it is unnecessary to multiply authorities, for it is clear, upon principle, that penetration, like any other element of crime, may be established by circumstantial evidence. In this case the circumstances prove the fact beyond doubt. The intent of the accused is fully proved, and his acts show that he did all in his power to accomplish his wicked design. That the act was not fully consummated was, it is clearly inferable, owing to the tender age of the victim of his lust.

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She was in his power, he was in a situation to do all that the structure of the organs of the child would permit him to do, and he did injure her genital organs. There is no reason to doubt that this injury was done by his attempt to force his virile member into her person, and if it penetrated to the slightest depth he is guilty, and was justly condemned. *Reg. v. Hughes*, 9 Carr. & P. 752.

We do not deem it either necessary or proper to rehearse the evidence, for it is of a character not to be repeated except upon the demand of an imperious necessity, and no such necessity exists in this instance.

Judgment affirmed.

Filed June 17, 1887.

No. 12,729.

THE INSURANCE COMPANY OF NORTH AMERICA v. BRIM.

INSURANCE.—Policy.—Alteration.—Burden of Proof.—In an action on a policy of insurance on the face of which no alteration is apparent, the burden is upon the insurer, if an alteration after delivery is claimed, to establish the fact of such change.

SAME.—Premium.—Rate.—Evidence.—Where the premium paid by the assured upon a policy purporting to be for five years, is more than the minimum rate for three years as established by the insurance companies doing business in the locality where the risk is taken, and less than such rate for five years, the exclusion of evidence showing the minimum rate so established, as bearing upon the question of an alteration in the policy of from three years to five years, is at most a harmless ruling.

SAME.—Contract.—Deceased Party to.—When Agent not Competent Witness.—In an action upon a policy of insurance by one who succeeded to the property therein described as heir and to the policy by assignment, testimony of an agent of the insurance company, who is called as a witness for the latter concerning matters occurring in the lifetime of the assured, is not competent under section 500, R. S. 1881.

SAME.—Notice of Loss.—Reasonable Diligence.—Invalid Condition.—A condi-

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115	300
120	583
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124	491
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147	550
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164	453
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165	323
111	281
171	412
171	413

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tion in a policy issued by a foreign insurance company doing business in this State, requiring immediate notice of any claim thereunder, is not valid under section 3770, R. S. 1881, and such condition will be held to mean that the assured shall use reasonable diligence in giving notice of loss.

SAME.—Reasonable Notice.—Instruction to Jury.—What constitutes reasonable notice must depend upon the circumstances of each case; but it is not for the jury to determine what facts in law constitute reasonable notice, this being the function of the court, to be discharged by instructing the jury as to the legal value of the facts in evidence.

SAME.—Incomplete Instruction.—An instruction that a condition requiring immediate notice was void, that if the plaintiff, taking into consideration all the circumstances, gave notice within a reasonable time the condition was complied with, and that it was a question of fact for the jury to determine, under all the circumstances, what was a reasonable time, is not erroneous, although incomplete.

SAME.—Time of Bringing Suit.—Void Condition.—A condition in a policy of insurance that suit must be brought within one year from the date of loss, is in contravention of section 3770, R. S. 1881, which provides that any condition not to sue for a period of less than three years shall be void, and a suit brought after a year is not barred.

From the Decatur Circuit Court.

C. Shane, W. A. Moore, J. O. Marshall, A. C. Harris and W. H. Calkins, for appellant.

J. D. Miller and F. E. Gavin, for appellee.

MITCHELL, J.—This was a suit by Mary Brim against the Insurance Company of North America, to recover upon a policy of insurance. The complaint alleges that on the 26th day of June, 1879, the company issued a policy of insurance, whereby it insured certain farm property, therein described, owned by Philip Brim, to the amount of \$2,500 against loss or damage by fire, from the 26th day of June, 1879, to the 26th day of June, 1884. The death of Philip Brim, and the succession of the plaintiff to the rights of the decedent in the property and policy, the destruction of certain parts of the property by fire, and the performance by the assured of the conditions of the policy are alleged.

The company answered by a general denial and a plea of *non est factum*, denying the execution of the policy.

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The question chiefly contested at the trial was, whether the policy expired on the 29th day of June, 1882, or on the 29th day of June, 1884. The contention of the insurance company was, that the date of the expiration of the policy, as written in the face, and endorsed upon the back thereof, had been changed from 1882 to 1884 by the addition of a perpendicular stroke to the figure 2 at each place, so as to make it appear thus "1884." Evidence was heard in support of the respective theories of the parties.

Pertinent to this feature of the case the court gave the jury the following charge:

"If the evidence, by a fair preponderance, shows that the policy sued on was signed and delivered by the defendant to the plaintiff, and the defendant claims an alteration thereof, the burden is upon the defendant to show such alteration, and if an alteration appears upon it, that it was made after delivery."

The jury found in answer to an interrogatory submitted to them, that there was no alteration apparent upon the face of the policy.

The law upon the subject involved in the instruction was given to the jury correctly. It was for the court and jury to judge, from an inspection of the policy, concerning the character of the alleged alteration. If there was nothing suspicious upon the face of the instrument, tending to raise a presumption that it had been altered after its execution, it was not necessary for the plaintiff, after proving its execution, to offer any proof, in the first instance, upon the subject of an alleged alteration. Within all the authorities, the burden of proof in such a case is upon the party alleging the alteration. *Meikel v. State Savings Institution*, 36 Ind. 355; *Stoner v. Ellis*, 6 Ind. 152; *Cochran v. Nebeker*, 48 Ind. 459; *Fitzgerald v. Goff*, 99 Ind. 28; *Sirrine v. Briggs*, 31 Mich. 443.

The jury having found that the policy presented no indication of having been altered, we are not required to examine

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the vexed question, concerning which the books abound in diverse decisions, as to what presumptions will be indulged in case the face of the instrument itself presents a suspicious appearance. *Neil v. Case*, 25 Kan. 510 (37 Am. R. 259).

Since there was no alteration apparent upon the face of the policy, whether the instruction of the court upon that subject was technically accurate or not, it was not influential in producing the verdict. *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264, 273 (54 Am. R. 312).

During the progress of the trial the appellant produced a witness, and, in answer to suitable questions for that purpose, proposed to prove that the uniform minimum rate established and existing between the different insurance companies represented in Greensburg at the time of the issuance of the policy in suit was one per cent. for three years, and one and one-half per cent. for five years, on detached farm property, such as that covered by the policy in question. The evidence was excluded. Without determining the abstract question concerning the admissibility of evidence of the character of that offered, it is manifest that the exclusion of the evidence proposed was harmless in this case. The policy recited that the premium paid, as a consideration for twenty-five hundred dollars insurance, was thirty dollars. There was no evidence controverting this. It is, therefore, apparent, whether the established rate of insurance in the city of Greensburg was, or was not, in accord with the proposed evidence, the appellant's agent did not, in this instance, conform to the rate established. If the policy was for three years, as the appellant contended, the premium charged was five dollars more than the rate. If it was for five years, the premium was less than the rate by seven dollars and a half. The evidence would have proved nothing to the appellant's advantage if it had been admitted. There was no error, therefore, in excluding the testimony.

The appellant proposed to prove by its agent, who issued the policy, certain matters in respect to the policy which

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must have occurred, if at all, in the lifetime of Philip Brim, deceased, with whom the contract of insurance was negotiated. Mrs. Brim succeeded to the property insured as heir, and to the policy of insurance by assignment. The agent was permitted to testify in respect to certain matters testified to by Mrs. Brim which occurred in the lifetime of her deceased husband. Concerning other matters so occurring, the proposed testimony was excluded. There was no error in this. Section 500, R. S. 1881; *Peacock v. Albin*, 39 Ind. 25; *Reynolds v. Linard*, 95 Ind. 48.

The fire occurred on the 10th day of August, 1883. The evidence tended to show that notice of the loss was communicated to the company's agent on the thirteenth day thereafter.

There was a condition in the policy requiring that immediate notice should be given of any claim to be made thereunder. Some circumstances appeared in the evidence tending to show an excuse for not notifying the agent at an earlier period.

Relevant to this feature of the case the court instructed the jury, in substance, that the condition requiring immediate notice was void; that if the plaintiff, taking into consideration all the circumstances, gave notice within a reasonable time, the provisions of the policy in that regard were complied with, and that it was a question of fact for the jury to determine, under all the circumstances, what was a reasonable time.

Section 3770, R. S. 1881, relating to foreign insurance companies doing business within this State, prohibits any such company from inserting certain conditions in its policy. Among others, conditions requiring notice of loss to be given forthwith, or within a period of less than five days, are prohibited. The statute provides, that any condition inserted in a policy contrary to its provisions shall be void. The effect of the statute is to invalidate any provision in a policy issued by a foreign insurance company which requires notice

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of a loss to be given within less than five days. The law makes such a condition in a policy conclusively unreasonable. Construed in connection with the law, the condition requiring immediate notice must be held to mean that the assured shall use reasonable diligence in giving notice of the loss. What constitutes reasonable diligence or reasonable notice must depend upon all the circumstances of each particular case. *Railway, etc., Assurance Co. v. Burwell*, 44 Ind. 460; Wood Fire Ins., section 414.

The purpose of the notice is to enable the company to take proper precautions for its own protection. The notice must be reasonable under all the circumstances. Where the facts are not in dispute, or when they have been ascertained by the proper tribunal for that purpose, it becomes a question of law for the court to determine whether, under the facts and circumstances of a given case, the notice was reasonable. Where the facts tending to show an excuse for the delay are in dispute, or where it is a disputed question whether the delay was occasioned by certain facts, it is for the jury to ascertain the facts, and the cause and effect of the delay, and, under proper instructions from the court, as to the force and effect of the facts found, determine whether or not, under all the circumstances, reasonable notice of the loss was given. Wood Fire Ins., section 412.

This rule properly applied does not, in any event, leave it to the jury to determine what facts in law constitute a reasonable notice. This is the function of the court, to be discharged by properly instructing the jury as to the legal value of the facts, as they may be found from the evidence. In view of the last clause of the instruction complained of, it was eminently proper that the court, either of its own motion, or at the request of the appellant, should have instructed the jury further, as to the facts and circumstances necessary to constitute a legal excuse for the delay, and under what circumstances, within the proof, the notice might have been deemed sufficient. The instruction in and of

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itself was not, however, erroneous. The appellant, so far as we are advised, made no request for further instructions. The case is, therefore, within the rule which denies a reversal in case an instruction is substantially accurate, but which might, with great propriety, have been supplemented with further instructions, in order to render it more intelligible and complete. *Wilson v. Trafalgar, etc., G. R. Co.*, 93 Ind. 287; *Board, etc., v. Legg*, 110 Ind. 479.

Without detailing the circumstances which appeared in evidence, it is sufficient to say, since it does not appear that the company made any objection to the claim on account of the insufficiency of the notice, or that any detriment resulted to it on account of the delay, the notice was, under all the circumstances, reasonably in time. Wood Fire Ins., section 414. Of course, if the policy had required notice to be given within a definite time, not within the period prohibited by statute, or if the notice had been unreasonably delayed without any circumstances of excuse, a failure to object to a notice given after the right of action on the policy had expired would not revive the right. *Trask v. State, etc., Ins. Co.*, 29 Pa. St. 198. This case is not within that rule. The policy contained a provision to the effect that if a suit or action should be commenced thereon, after the expiration of one year from the date of the loss, the lapse of time should be deemed conclusive against the validity of the claim. This suit was not brought until after the expiration of one year, and it is now contended that the above mentioned stipulation defeated the plaintiff's right to recover on the policy.

The statute already referred to enacts that any condition or agreement in a policy of foreign insurance, "not to sue for a period of less than three years," shall be void, and it also provides that any condition inserted in a policy to avoid the provisions of that section shall be void. It is at once obvious that the condition in the policy and the provisions of the statute can not stand together. It is said the pro-

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vision in the policy, the practical effect of which was to bar a right of action after one year, was such a contract as the parties had the right to make, and that such right was not subject to legislative control.

While the general proposition may be conceded, that insurance companies have the right to contract that parties shall assert their claims against them within a reasonable time (*Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386), yet the constitutional right of the Legislature to prescribe the terms upon which foreign corporations may transact business within the State is also abundantly established. *Farmers, etc., Ins. Co. v. Harrah*, 47 Ind. 236; *Bank of Augusta v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Cooper Man'f'g Co. v. Ferguson*, 113 U. S. 727; *Cincinnati Mutual, etc., Co. v. Rosenthal*, 55 Ill. 85; *Thorne v. Travellers Ins. Co.*, 80 Pa. St. 15.

The statute must be regarded as a legislative declaration, that less than three years is an unreasonable limit within which to require parties holding claims under a policy of foreign insurance to assert their claims or be forever barred. This statute was in force when the contract of insurance was consummated, and it must be conclusively presumed that the contract was made with a due regard for the law. In so far as the statute and the condition in the policy are in conflict, the statute must prevail. It is said the statute is unconstitutional. Counsel have not called our attention to any provision of the Constitution which is supposed to be infringed, and we know of none.

The judgment is affirmed, with costs.

Filed June 15, 1887.

Hollingsworth v. The State.

No. 13,832.

HOLLINGSWORTH v. THE STATE.

OFFICE AND OFFICER.—New Bond.—Power of Circuit Judge to Require.—Declaring Vacancy—The act of 1852, conferring certain powers upon the judge of the court of common pleas relative to requiring new bonds from public officers, declaring vacancies, etc., since such court has been abolished, is applicable to the circuit court. Section 5538, *et seq.*, R. S. 1881.

SAME.—County Treasurer.—Sureties.—Release from Bond.—Failure to Give New Bond.—Vacancy.—Where the sureties in the bond of a county treasurer petition the judge of the circuit court to be released therefrom, such judge may, after proper notice to the treasurer, and a failure on his part to furnish an additional bond, as required by the statute, declare the office vacant.

CRIMINAL LAW.—Embezzlement.—County Treasurer.—Indictment.—Description of Funds.—Under the act of 1883 (Acts of 1883, p. 106) it is not necessary to the sufficiency of an indictment charging a county treasurer with embezzlement that it should contain a particular description of the different funds embezzled, *i. e.*, whether county funds, school funds, etc.

SAME.—Proceedings Declaring Vacancy.—Admissibility in Evidence.—Defective Summons.—Upon the trial of a county treasurer, charged with embezzlement, proceedings before the circuit judge, upon petition of his sureties, wherein the office is declared vacant, are admissible in evidence, notwithstanding the summons in that proceeding did not state where the petition would be heard. If such a statement is required under sections 5538 and 5545, R. S. 1881, its omission is a mere irregularity, not available collaterally.

SAME.—Affirmative Showing of Error.—An objection to the admission in evidence of the order of the judge declaring the office of treasurer vacant, on the ground that no record of the proceedings appears to have been made, is not available unless it affirmatively appears that such record was not made.

SAME.—Instructions.—Bill of Exceptions.—Supreme Court.—The mere act of the clerk in copying into the transcript what purport to be instructions given by the court, but which are not made part of the record by a bill of exceptions or otherwise, does not present them in a manner authorizing consideration by the Supreme Court.

SAME.—Excluding Documentary Evidence.—Showing of Error.—The Supreme Court can not determine that there was error in ruling out offered documentary evidence if the instruments excluded are not in the record.

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135	454
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141	278
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150	392
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SAME.—*Embezzlement by County Treasurer.*—*Demand not Necessary to Establish.*

—A demand upon a retiring county treasurer by his successor for the funds remaining in his hands is not necessary in order to establish a conversion and embezzlement of such funds.

SAME.—*Evidence.*—*Voluminous Records.*—*Expert Accountants.*—In a prosecution for embezzlement, or other crime, where the books, records, papers and entries are voluminous, and of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts, expert accountants may be allowed to examine such books, etc., and testify to the result.

From the Knox Circuit Court.

J. S. Pritchett, W. H. De Wolf, S. N. Chambers and E. H. De Wolf, for appellant.

L. T. Michener, Attorney General, *J. C. Adams*, Prosecuting Attorney, *J. H. Gillett* and *W. F. Townsend*, for the State.

ZOLLARS, C. J.—It is charged in the indictment that appellant was elected treasurer of Knox county in 1884, for the term of two years, ending on the 13th day of November, 1886; that he gave bond, qualified and served as such treasurer until the 8th day of May, 1886; that, on the 27th day of April, 1886, the sureties on his official bond petitioned the judge of the Knox Circuit Court, in writing, to be released therefrom; that the judge, on that day, caused a summons to be served on appellant commanding him to appear ten days thereafter, and give additional bond with sureties; that the summons having been served and returned, and appellant having failed to execute a new bond with sureties at the time set for the hearing, the judge declared the office of treasurer vacant, and notified the Governor; that, on the 19th day of May, 1886, Charles S. Mathesie entered upon the discharge of the duties of treasurer for the unexpired term, having been appointed as such treasurer by the board of commissioners of Knox county; that at the time the office was declared vacant by the judge, appellant had in his hands \$75,000 of the money which he had received by virtue of the office of treasurer during the term he served as such; that, on the 20th day of May, 1886,

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Mathesie, treasurer as aforesaid, demanded of appellant the \$75,000, and demanded of him to pay over or account for all the moneys which had come into his hands by virtue of the office; that appellant fraudulently failed and refused, and has ever since failed, to pay over or account for the \$75,000, or any part of it, etc.

Appellant questioned the sufficiency of the indictment for the first time by a motion in arrest of judgment.

It is contended, in the first place, that the indictment is bad because it shows upon its face that appellant's term of office had neither expired nor been terminated at the time Mathesie was appointed, nor at the time the indictment was found and returned. This contention rests upon the further contention that the judge of the circuit court had no authority to hear the application of the sureties, nor to declare the office vacant. The act authorizing such a procedure was passed in 1852. 1 R. S. 1876, p. 190. The first section provided, that when the sureties in an official bond of any officer might remove from the State, or become insufficient, the clerk of the court of common pleas, on his own motion, or upon the affidavit of a person competent to vote for such officer, should issue a writ to the sheriff, commanding the officer to appear before the judge of the court of common pleas, ten days after the service of such process, at the court-house of the county, to answer such complaint, etc.

The second section provided that such clerk, on return of the process served, should notify such judge of the time and place of hearing.

Section three provided that, at the time set therefor, such judge should hear and determine such complaint, and, if deemed proper, might require a new bond with sufficient additional sureties to be executed and filed within ten days.

Section four provided that, if the bond should not be filed within the required time, such judge might declare the office vacant.

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Section five provided that either party might appeal from the decision of such judge to the circuit court of the county.

Section six provided that, upon the hearing, the circuit court might require a new bond to be filed, with sureties to the acceptance of such judge of the court of common pleas.

Section seven provided that, if the order of the court was not complied with, such judge should declare the office vacant.

Section eight provided, that whenever any sureties in an official bond should petition "such judge" in writing to be released therefrom, he should cause a summons to be personally served on the officer complained of, by the sheriff, commanding him to appear before such judge ten days after the service thereof, and give additional bond and sureties.

Section nine provided that the clerk, upon the return of the summons, should notify the judge of the court of common pleas as in section two.

Section ten provided that, if the officer failed to give such additional bond or sureties on the day set for hearing such complaint, such judge should declare his office vacant.

The sections following, each prescribed duties to be performed by the judge of the court of common pleas.

It will be noticed that the proceeding provided for was to be conducted before, and by, the judge of the common pleas court, except where an appeal was taken to the circuit court. So far as we have been able to discover, the act has not been amended, nor the language changed by any direct act of the Legislature. The revisers inserted the act in the revision of 1881. R. S. 1881, section 5538, *et seq.* They seem to have substituted judge of the circuit court, and clerk of the circuit court, in place of judge of the court of common pleas, and clerk of the court of common pleas, in the original act. Their substitution, of itself, of course, did not, and could not, operate as an amendment or change of the act. To be made available now, however, the act must be read as the revisers have made it read. May it, under any act of the

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Legislature, be so read, and made applicable to the circuit court? We think it may. In 1873 the courts of common pleas were abolished, and the circuit courts remodeled. The act provided, amongst other things, that "Such circuit courts, in addition to the jurisdiction heretofore exercised by them, shall also have the same jurisdiction that has heretofore been exercised by the courts of common pleas; *and all laws and parts of laws concerning said courts of common pleas shall be hereafter construed to mean and apply to said circuit courts, so far as the same may be applicable.*" All writs, subpoenas, publications and process of whatever kind in the courts of common pleas were made returnable to the circuit courts, the same as if they had issued out of those courts. R. S. 1881, sections 1335, 1336. That act, we think, made the above act of 1852 "to mean and apply" to the circuit courts. While, in the act of 1852, duties and powers were prescribed to be performed and exercised by the judge of the court of common pleas, the act was yet an act concerning courts of common pleas. The powers and duties were devolved upon the judge, not as an individual, but as the judge of the court. If, at the time the common pleas court ceased to exist, a writ issued upon the complaint of sureties had been in the hands of the sheriff, we think that, without doubt, it should have been returned to the circuit court. It has not been directly adjudicated that the above act of 1852 is applicable to the circuit courts, but we have a case which was decided upon the assumption that it is so applicable. *Harvey v. State, ex rel.*, 94 Ind. 159.

It is apparent, also, aside from the act of 1873, *supra*, that the Legislature intended that the above act of 1852 should be applicable to the circuit courts, and did not consider it necessary to amend the act by inserting judge and clerk of the circuit court, instead of judge and clerk of the court of common pleas. The act abolishing the common pleas court was approved March 6th, 1873. The Legislature that passed that act also passed an act, approved on March 8th, 1873,

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amending the fifteenth section of the above act of 1852. That amendment was enacted upon the assumption that the proceeding provided for in the act might still be had, notwithstanding the abolition of the common pleas court; for, as amended, the section provides that the county board may direct the clerk of the circuit court to institute the proceeding under the act for new official bonds and additional sureties.

It is further insisted that the funds charged to have been embezzled should have been particularly specified, whether county funds, school funds, etc., and that the indictment is bad for want of such particular description.

The act of 1883 (Acts 1883, p. 106) provides that it shall be the duty of the treasurer of each of the several counties receiving money in his official capacity, at the expiration of his term of office, to pay over to his successor in office all moneys of every description, to whomsoever due, remaining in his hands at the expiration of such term, and that any treasurer so failing to pay over such moneys shall be deemed guilty of embezzlement. The contention of counsel is fully met and overthrown by the cases of *People v. McKinney*, 10 Mich. 53, *State v. Smith*, 13 Kan. 274, and *State v. Graham*, 13 Kan. 299.

It may be observed, in passing, also, that the assault upon the indictment is subsequent to the verdict. *Trout v. State*, 107 Ind. 578.

In support of the motion for a new trial below, it is insisted that the court erred in admitting in evidence the proceedings resulting in the vacation of the office of treasurer by the circuit judge. One point urged is, that the summons in that proceeding did not fix any place where the complaint or application of the sureties would be heard.

Section 1 of the act (section 5538, R. S. 1881), under which new bonds may be required when the sureties have moved from the State or become insufficient, provides that a writ

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shall be issued, commanding the officer to appear before the judge of the court at the court-house, etc.

Section 8 (section 5545, R. S. 1881), under which sureties in official bonds may institute the proceeding to be released therefrom, provides that a summons shall be served upon the officer, commanding him to appear before the judge ten days after the service ; but it does not require that the summons shall contain a statement that he shall appear at the court-house. But, conceding that the summons ought to contain such a statement, its omission would be, at most, but an irregularity, which would not affect the validity of the proceeding, coming in question collaterally, as it does here. *Ross v. Glass*, 70 Ind. 391 ; *Dunkle v. Elston*, 71 Ind. 585 ; *Morgan v. Woods*, 33 Ind. 23 ; *McMullen v. State, ex rel.*, 105 Ind. 334.

The service of the summons for the purposes of this case, we think, was sufficient. The return of the sheriff was: "Came to hand April 27th, 1886 ; and, as commanded, I served this summons to, and in the hearing of, Spear S. Hollingsworth, within named treasurer of Knox county, the 27th day of April, 1886." For the word "served" the word "read" was evidently meant.

It is contended that the order of the judge declaring the office of treasurer vacant should not have been admitted in evidence, because no record appears to have been made of the proceedings. In answer to that it is sufficient to say, that it does not appear that a record of the proceedings was not made. The State offered and read in evidence the petition of the sureties, the summons, the return thereon, and the final order of the court declaring the office vacant. No objections were made on the ground that the several papers and the final order were not the papers and final order in the proceeding.

For aught that is made to appear, the whole proceeding may have been made a matter of record in the order-book of the court ; and for aught that is made to appear, the final

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of a loss to be given within less than five days. The law makes such a condition in a policy conclusively unreasonable. Construed in connection with the law, the condition requiring immediate notice must be held to mean that the assured shall use reasonable diligence in giving notice of the loss. What constitutes reasonable diligence or reasonable notice must depend upon all the circumstances of each particular case. *Railway, etc., Assurance Co. v. Burwell*, 44 Ind. 460; Wood Fire Ins., section 414.

The purpose of the notice is to enable the company to take proper precautions for its own protection. The notice must be reasonable under all the circumstances. Where the facts are not in dispute, or when they have been ascertained by the proper tribunal for that purpose, it becomes a question of law for the court to determine whether, under the facts and circumstances of a given case, the notice was reasonable. Where the facts tending to show an excuse for the delay are in dispute, or where it is a disputed question whether the delay was occasioned by certain facts, it is for the jury to ascertain the facts, and the cause and effect of the delay, and, under proper instructions from the court, as to the force and effect of the facts found, determine whether or not, under all the circumstances, reasonable notice of the loss was given. Wood Fire Ins., section 412.

This rule properly applied does not, in any event, leave it to the jury to determine what facts in law constitute a reasonable notice. This is the function of the court, to be discharged by properly instructing the jury as to the legal value of the facts, as they may be found from the evidence. In view of the last clause of the instruction complained of, it was eminently proper that the court, either of its own motion, or at the request of the appellant, should have instructed the jury further, as to the facts and circumstances necessary to constitute a legal excuse for the delay, and under what circumstances, within the proof, the notice might have been deemed sufficient. The instruction in and of

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itself was not, however, erroneous. The appellant, so far as we are advised, made no request for further instructions. The case is, therefore, within the rule which denies a reversal in case an instruction is substantially accurate, but which might, with great propriety, have been supplemented with further instructions, in order to render it more intelligible and complete. *Wilson v. Trafalgar, etc., G. R. Co.*, 93 Ind. 287; *Board, etc., v. Legg*, 110 Ind. 479.

Without detailing the circumstances which appeared in evidence, it is sufficient to say, since it does not appear that the company made any objection to the claim on account of the insufficiency of the notice, or that any detriment resulted to it on account of the delay, the notice was, under all the circumstances, reasonably in time. Wood Fire Ins., section 414. Of course, if the policy had required notice to be given within a definite time, not within the period prohibited by statute, or if the notice had been unreasonably delayed without any circumstances of excuse, a failure to object to a notice given after the right of action on the policy had expired would not revive the right. *Trask v. State, etc., Ins. Co.*, 29 Pa. St. 198. This case is not within that rule. The policy contained a provision to the effect that if a suit or action should be commenced thereon, after the expiration of one year from the date of the loss, the lapse of time should be deemed conclusive against the validity of the claim. This suit was not brought until after the expiration of one year, and it is now contended that the above mentioned stipulation defeated the plaintiff's right to recover on the policy.

The statute already referred to enacts that any condition or agreement in a policy of foreign insurance, "not to sue for a period of less than three years," shall be void, and it also provides that any condition inserted in a policy to avoid the provisions of that section shall be void. It is at once obvious that the condition in the policy and the provisions of the statute can not stand together. It is said the pro-

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proper sources from which to derive the data upon which to compute the amounts received and paid out by appellant.

Some other questions are suggested in the brief of appellant's counsel, but they are not supported by any argument, or attempt at argument, nor by the citation of any authorities. Such suggestions or statements do not fill the requirements of the rules of this court upon the subject of briefs. It has been many times held by this court that without a brief substantially as required by the rules, alleged errors will not be passed upon. *Liggett v. Firestone*, 102 Ind. 514; *Pratt v. Allen*, 95 Ind. 404; *Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 217; *Landwerlen v. Wheeler*, 106 Ind. 523.

Some irregularities, perhaps, intervened in the trial below, but upon an examination of the whole case, it is apparent that they did not affect the substantial rights of appellant.

The statute makes it the duty of this court, in the consideration of questions which are presented upon an appeal in a criminal cause, to disregard technical errors or defects, or exceptions to any decision or action of the court below, which did not, in the opinion of this court, prejudice the substantial rights of the defendant. Section 1891, R. S. 1881; *Dukes v. State*, 11 Ind. 557; *Myers v. State*, 101 Ind. 379; *Stout v. State*, 96 Ind. 407; *O'Connor v. State*, 97 Ind. 104; *Thomas v. State*, 103 Ind. 419 (437).

That appellant was short in his accounts there can be no question, upon the evidence in the record. Some of the witnesses testified to his admissions of that fact. Upon the trial he made no effort to contradict that testimony, nor did he attempt in any way to meet the case made by the State, by showing that he had received less than the amounts shown by the State's evidence, or that he had paid out more than the amounts shown by that evidence. That, upon the evidence in the record, appellant was guilty of embezzlement under the statute there can be no doubt.

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The record, we think, presents no error for which this court should reverse the judgment.

Judgment affirmed.

Filed June 18, 1887.

No. 12,809.

STRIEB v. COX, TREASURER, ET AL.

FREE GRAVEL ROAD.—Assessment.—Collateral Attack.—Assessments for the construction of a free gravel road can not be impeached collaterally, unless the proceedings of the board of commissioners under which they are made are void.

COUNTY INDEBTEDNESS.—Free Gravel Road Bonds.—Constitutional Inhibition.—Bonds issued by a board of commissioners, under the provisions of section 5097, R. S. 1881, for the purpose of raising money for the construction of a free gravel road, do not constitute or evidence an indebtedness incurred by the county within the inhibition of article 13 of the State Constitution.

From the Grant Circuit Court.

J. A. Kersey and *L. D. Baldwin*, for appellant.

A. Steele and *R. T. St. John*, for appellees.

HOWK, J.—Errors are assigned here by appellant, the plaintiff below, upon the record of this cause, which call in question (1) the overruling of his demurrer to the third paragraph of appellees' answer, (2) the sustaining of appellees' demurrer to the first and second paragraphs of appellant's reply, and (3) the sustaining of appellees' demurrer to the third paragraph of appellant's reply.

From these assignments of error, it is manifest that this case is presented here solely upon the pleadings of the parties respectively. The suit was by appellant, Strieb, as plaintiff, against the appellees, the treasurer, auditor and board of commissioners of Grant county, as defendants. In

111	299
111	600
112	366
115	330
116	381
120	523
111	299
124	299
125	463
127	505
111	299
128	76
128	238
111	299
130	517
111	299
131	424
132	29
132	217
111	299
135	333
111	299
137	388
111	299
140	254
111	299
146	471
146	503
111	299
148	473
149	122
111	299
153	250
153	278
111	299
155	488
155	495
111	299
171	722

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his complaint herein, which was filed below on the 23d day of January, 1884, appellant alleged that he was a citizen and taxpayer of Grant county, and had paid all taxes legally assessed against and due from him in such county; and that he was the owner, in fee simple, of certain parcels of real estate, particularly described, all in Grant county.

Appellant further alleged that, on the 14th day of August, 1883, the value of all the taxable property within Grant county, as ascertained by the last assessment for State and county taxes, prior to the day and year last named, was \$8,972,840, and that two per centum of that amount was \$179,456.80; that, on such 14th day of August, 1883, and for three months previously, such county of Grant was indebted in the sum of \$280,301.33, of which indebtedness of such county the sum of \$215,000 was then and since evidenced by the bonds of such county of Grant, then and since outstanding as evidences of such indebtedness; that, on such 14th day of August, 1883, such county of Grant being so indebted as aforesaid, the board of commissioners of such county then and there contracted and issued the bonds of such county, for further indebtedness, in the sum of \$43,000; that there was not then, nor had there been since, any money in the treasury of Grant county, out of which such additional indebtedness of \$43,000, or any part thereof, could be paid or that could be applied to the payment thereof.

And appellant further alleged that, for the payment of the bonds of such county of Grant, issued for and evidencing such additional indebtedness of \$43,000, the board of commissioners of such county had levied and assessed a special tax of \$1,104.50 upon appellant's real estate described in his complaint, and had attempted to order, adjudge and decree the same a first lien upon all such real estate, and had caused such county auditor to place the same on a special tax duplicate, called a gravel road tax duplicate, and to deliver the same to such county treasurer; and that such treasurer then had such duplicate in his hands, and was threatening and

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about to proceed to collect such pretended assessment and tax by distress and sale of such real estate, to the great and irreparable injury of appellant. Wherefore, etc.

In the third paragraph of their joint answer, appellees alleged that, on April 6th, 1881, certain citizens and land-owners of Grant county petitioned the board of commissioners of such county for the location and construction of a free gravel road, known as the Marion and Huntington free gravel road, and being the same road named in the complaint herein; that such petition was duly considered and its prayer granted by such board of commissioners; that said petitioners also filed their bond as required by the statute; that thereupon such board of commissioners appointed three disinterested freeholders to view, locate and lay out said road, who were duly notified thereof by such county auditor; that after having given due notice of the time and place of meeting, and of the kind of improvement asked for, such viewers met at such time and place, and, having first taken an oath for the faithful and impartial discharge of their duties as such, they duly proceeded to view, examine, lay out and locate the said road according to law; that such viewers and their engineer made their report to such county board, at its next regular session, and therein stated that said road would, when completed, be of public utility, and reported their estimate of the expense of such improvement; and that, upon the return of said report, such board of commissioners found and entered of record that said road would be of public utility and benefit, and then and there ordered that said improvement be made according to law.

And appellees further averred, that a majority of the resident land-owners of such county, whose lands would be affected, and being a majority of the owners of the whole number of acres of lands reported as benefited, subscribed said petition; that after such order was finally made, such county board ordered and appointed ——— as engineer of said work, who, with the approval of such board, let such

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work to contract according to the statute in such case provided, after having given public notice of such letting for two weeks in a newspaper printed and published in Grant county; that such county board appointed three disinterested freeholders of said county who, upon actual view, apportioned the estimated expense of said improvement upon the lands so found to be benefited thereby, and made their report thereof to such county auditor; that when such report was so made and filed, such county auditor gave notice of it and of the meeting of such county board to consider the same, by publication in a newspaper of general circulation in said county, for three weeks successively; that appellant well knew that such proceedings had been had, and that such assessments on his lands had been made; that, on the day named in said notice, appellant appeared before such county board and remonstrated, in writing, against said assessments on his said lands; that such county board then referred the assessments against appellant's lands and all other lands affected by said improvement to new viewers, to wit, etc., three disinterested freeholders of such county, to review and report thereon; and that afterwards, at the March term, 1883, of said board of commissioners, such reviewers made and filed their report of the estimate and apportionment of expense on all such lands, including those of appellant; that thereupon appellant again appeared before said county board and, in writing, remonstrated against his said assessments, which remonstrance was overruled by such board; and that, with appellant's full knowledge, such county board duly confirmed said assessment and apportionment. All of which proceedings were had more than thirty days before the commencement of this suit, and remained of record in full force and unappealed from.

And the appellees averred that, upon the faith of such assessment, the said road was let to contract, and was fully and finally completed, as appellant well knew, before he commenced this suit; that such bonds in his complaint named,

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as appellant knew at the time, were ordered by such county board to be issued before he filed his said remonstrance; that during all the time the said road was being constructed appellant was a resident of Grant county, and in the neighborhood of such road, and knew of its construction, and made no objection thereto in any way until said road had been completed, and all the benefits to his lands from such road had been received and realized; and that part of the contract price, for the construction of said road, remained due and unpaid. Wherefore, appellees said that appellant was estopped to assert and litigate the claims and facts stated in his complaint herein, and ought not to be permitted to prosecute his action in that behalf; and they prayed judgment accordingly, and for all other proper relief.

As we have already seen, the first error of which complaint is here made by appellant, in the cause under consideration, is the overruling of his demurrer to the third paragraph of appellees' joint answer herein, the substance of which we have given.

From the facts alleged in this paragraph of answer, it is manifest that appellees have therein stated and set forth the proceedings and orders of the board of commissioners of Grant county, upon a petition duly presented to such board for the location and construction of the "Marion and Huntington Free Gravel Road," as constituting a full and complete defence in bar of appellant's cause of action, stated in his complaint herein. These proceedings and orders of such county board were shown by appellees, in the third paragraph of their joint answer, to have been duly instituted and regularly had under, and in strict conformity with, the provisions of the act of March 3d, 1877, entitled "An act authorizing boards of county commissioners to construct gravel, macadamized, or paved roads, upon petition of a majority of resident land-owners along and adjacent to the line of any road; authorizing them to issue bonds of the county, to raise money required for that purpose, and provide for the pay-

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ment of such bonds by taxing land adjacent to the road," etc. Acts of 1877, Reg. Sess., p. 82, *et seq.*; sections 5091 to 5103, R. S. 1881.

Under the provisions of the above entitled act, the boards of commissioners of the several counties in this State are clothed with original jurisdiction, and required to exercise judicial powers and duties, in relation to the location, establishment and construction of free gravel, macadamized and paved roads within their respective counties.

Under the averments of the third paragraph of appellees' joint answer, the board of commissioners of Grant county had full and complete jurisdiction of the free gravel road described in the petition, mentioned in such paragraph of answer. The presentation of this petition to such board of commissioners, as stated in such paragraph, called into exercise its jurisdiction, and required such board to determine as to the sufficiency of such petition, both in form and substance, whether or not it was signed by the requisite number of land-holders, whose lands would be assessed for the cost of the proposed improvement, and every other fact, precedent or concurrent, necessary to the granting of the prayer of such petition. *Million v. Board, etc.*, 89 Ind. 5.

It was shown, also, by the averments of such third paragraph of answer, that proper notices were given, as required by the statute, and appellant had personal knowledge, also, of the pendency of such petition and of all the proceedings and orders of the county board had thereon; that he appeared before the board and remonstrated against and resisted such proceedings and orders; that the assessments on his lands, whereof he complains in this action, were confirmed by the county board over his written remonstrances, and that he failed to appeal from such proceedings, orders and assessments within the time allowed by law.

Upon this showing made by appellees, in the third paragraph of their joint answer herein, we are of opinion that the assessments on appellant's real estate, for the construction

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of the free gravel road named in such paragraph, are valid, binding and conclusive, and can not be impeached collaterally. This is the doctrine of all our decided cases upon the subject under consideration. *Evansville, etc., R. R. Co. v. City of Evansville*, 15 Ind. 395; *Dequindre v. Williams*, 31 Ind. 444; *Board, etc., v. Markle*, 46 Ind. 96; *Board, etc., v. Hall*, 70 Ind. 469; *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 85 Ind. 471; *Dowell v. Lahr*, 97 Ind. 146; *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486; *Laverty v. State, ex rel.*, 109 Ind. 217; *Walker v. Hill, ante*, p. 223.

Of course, if the proceedings and orders of the board of commissioners of Grant county, in relation to the construction of the Marion and Huntington free gravel road, and the assessments on appellant's real estate for the cost of such improvement, were void for any cause or reason, it would not be necessary to appeal from such void proceedings, orders and assessments, but the same might be attacked and impeached in any collateral suit.

It will be seen from the averments of appellant's complaint, the substance of which we have heretofore given, that it proceeds upon the theory that such proceedings, orders and assessments were and are wholly void, because the board of commissioners, for the purpose of raising the money necessary to meet the expense of constructing said free gravel road, had issued bonds of the county to the amount of \$43,000. It was alleged in the complaint that, at the time of the issue of the bonds of the county to meet the expense of such improvement, the aggregate indebtedness of Grant county already exceeded two per centum on the value of the taxable property within such county, as shown by the last assessment for State and county taxes, previous to the issue of such bonds. It is assumed that, by the issue of such bonds for the purpose aforesaid, Grant county incurred an additional indebtedness to the amount of such bonds, in direct contravention of the provisions of article 13, adopted March 14th,

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1881, of our State Constitution, and that such bonds, so issued, were void. If such assumption were correct, it might well be doubted, as it seems to us, whether the fact that the bonds so issued were void would invalidate or avoid the proceedings and orders of the county board for the construction of the free gravel road, or the assessments made on adjacent real estate for the cost of such improvement. We do not find it necessary to consider or decide the question suggested, in the view we take of the cause of action stated in appellant's complaint herein.

The bonds issued by the board of commissioners of Grant county, for the purpose of raising the money necessary to meet the expense of constructing the Marion and Huntington free gravel road, were issued under the provisions of section 7 of the above entitled act, of March 3d, 1877, as such section was amended by an act which took effect and was in force on March 3d, 1881. Section 5097, R. S. 1881. In such section as amended it is provided as follows: "For the purpose of raising the money necessary to meet the expense of said improvement, the commissioners of the county are hereby authorized to issue the bonds of the county, maturing at annual intervals after two years, and not beyond eight years, bearing interest at the rate not to exceed six per cent. per annum, payable semi-annually; which bonds shall not be sold for less than their par value. Said assessment shall be divided in such manner as to meet the payment of principal and interest of said bonds, and so be placed upon the duplicate for taxation against the lands assessed, and collected in the same manner as other taxes; and when collected, the money arising therefrom shall be applied to no other purpose than the payment of said bonds and interest: *Provided*, That no bonds shall be delivered, or money paid to any contractor, except on estimate of work done, as the same progresses or is completed, and said road or improvement shall be kept in repair, as other State and county roads are: *Provided, further*, That the amount of such bonds outstanding at any one time

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shall not exceed the sum of one hundred thousand dollars principal."

We are of opinion that the bonds issued by the board of commissioners of Grant county, under the provisions of the section quoted and pursuant to the authority thereby conferred, did not and do not constitute an indebtedness of such county, and did not and do not evidence an indebtedness incurred by such county, within the inhibition of article 13 of our State Constitution. Such bonds are not payable by the county, or out of the general funds of the county treasury. They are payable out of the particular fund to be raised by the collection of the assessments made on the lands adjacent to such free gravel road, "divided in such manner as to meet the payment of principal and interest of said bonds," and placed as divided upon the tax duplicates against the lands assessed, "and collected in the same manner as other taxes," which fund, when so collected, "shall be applied to no other purpose than the payment of said bonds and interest." No other provision is made by law for the payment of either the bonds or the interest thereon; and the bonds and interest are made payable out of the particular fund to be derived from the collection of the assessments made on the lands adjacent to such free gravel road, and from no other source, and such fund is pledged by the statute for the payment of said bonds and interest. It is manifest, we think, from all the provisions of the above entitled act of March 3d, 1877, and the amendments thereof, that the Legislature intended that the entire cost and expense of constructing any free gravel, macadamized or paved road, and all bonds of the county issued for the purpose of raising the money necessary to meet the expense of such improvement, should be borne and paid out of the particular fund to be raised by and from the collection of the assessments made on the lands adjacent to such road. While it is provided that the preliminary expenses of such an improvement may be paid out of the county treasury, yet it is further provided that the amount

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so paid must be refunded out of the particular fund to be raised as aforesaid from the assessments on adjacent lands. Section 5096, R. S. 1881; *Board, etc., v. Fullen, post*, p. 410; *Robinson v. Rippey, ante*, p. 112.

Appellant has also assigned, as errors, the sustaining of appellees' demurrers to the first, second and third paragraphs of his reply. In the first and third paragraphs of his reply, appellant has stated matters which might, perhaps, have been available to him if he had appealed at the proper time from the proceedings, orders and assessments set forth in the third paragraph of appellees' joint answer herein, but which can be of no possible service to him in this collateral suit. In the second paragraph of his reply, appellant set up substantially the same matters stated in his complaint herein. The demurrers to the several paragraphs of reply, we think, were correctly sustained.

The judgment is affirmed, with costs.

Filed June 21, 1887.

111	308
112	144
113	298
121	470
121	480
111	308
130	202

111	308
153	194

111	308
161	615

111	308
166	504

No. 12,573.

THE FURST & BRADLEY MANUFACTURING COMPANY
v. BLACK ET AL.

GUARANTY.— *Notice of Acceptance by Guarantee.*— *When Necessary.*— Where there is a mere proposal on the part of those sought to be charged as guarantors to guaranty the faithful performance of some obligation which another may enter into, provided credit shall be extended, or a duty undertaken, the contract of guaranty is incomplete until the original obligation is entered into and the proposition of guaranty accepted, and due notice thereof given to the guarantors.

SAME.— *When Notice of Acceptance Unnecessary.*— Where a guaranty is for the fulfilment of a contract already made, or for one executed contemporaneously with the contract of guaranty, or for the payment of an existing debt, or where the contract of guaranty is upon a consideration distinct from the credit extended to the principal debtor, and which

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moves directly between the guarantor and guarantee, notice of acceptance is unnecessary.

SAME.—Direct Guaranty.—When Guarantors Entitled to no Notice of Default.—

An engagement on the part of guarantors or sureties themselves to pay or perform absolutely, and at all events, the contract of their principal, is in its nature original, direct and absolute, and the promisors are entitled to no notice of the default of their principal.

SAME.—Indirect and Collateral Guaranty.—When Guarantors Entitled to Notice of Principal's Default.—Where guarantors agree that their principal will perform his contract, they not engaging to perform it in case he makes default, the guaranty is indirect and collateral, and the guarantors are entitled to notice of the default of the principal.

SAME.—Failure to Give Notice.—Defence.—The failure of the guarantee to give notice to the guarantor of the default of the principal debtor, where such notice is required, and the damages resulting from such failure, are matters of defence, and should be specially pleaded.

From the Jasper Circuit Court.

S. P. Thompson, for appellant.

F. W. Babcock and *E. P. Hammond*, for appellees.

MITCHELL, J.—On the 26th day of February, 1878, Samuel M. Black, residing at Remington, Indiana, signed and transmitted to Henry J. Prier, of Indianapolis, Indiana, the following order and proposal:

“H. J. PRIER, INDIANAPOLIS, INDIANA:

“Please have manufactured for us, and deliver at the depot in Chicago, which you will ship to Remington *via* Logansport railway, by ——— or within ten days thereafter, the goods specified in this list, for which we agree to pay as follows, viz. :” (Here follows a list of the articles to be shipped, with time of credit and rate of discount).

“We also agree to settle for the same monthly, by notes, or notes with security, due as above, and to pay interest at the rate of ten per cent. per annum on all notes and accounts after maturity, and to remit with exchange on New York or Chicago, or by express, charges prepaid.

“We further agree to pay for all goods shipped us for this season's trade subsequent to those now herein ordered, on

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same terms as above, all payable without relief from valuation or appraisement laws. S. M. BLACK."

Upon the back of this order there was endorsed the following contract of guaranty:

"For and in consideration of the credit which H. J. Prier may extend to S. M. Black, and in further consideration of one dollar to me in hand paid by H. J. Prier, the receipt of which is hereby acknowledged, I hereby guarantee to him the fulfilment of the within contract on the part of the said S. M. Black, and the payment by S. M. Black to H. J. Prier or order, without demand, of all moneys for the payment of which the said S. M. Black may become liable under this contract, including all implements that may be ordered of the said H. J. Prier subsequent to this date and during the year 1878.

"I further guarantee to the said H. J. Prier the payment of all notes that may be taken by him in part or full payment of all sums for which he may become liable under this contract, including in the above guarantee the payment of all notes made by any other person whatever that may be transferred to said H. J. Prier by S. M. Black. Payable without relief from valuation or appraisement laws.

"A. M. TRAUGH.

"S. N. SNODDY.

"S. A. HENRY."

The order or agreement proposed by Black was accepted by the following endorsement written thereon:

"H. J. Prier agrees to accept the above order on conditions named, or notify you within twenty days from this date. H. J. PRIER."

In a complaint upon the contract of guaranty set out above, it was alleged that, on the 10th day of August, 1878, Prier and Black had a settlement and accounting of their dealings under the foregoing contract, at which it was found that there was due from Black to Prier the sum of about thirteen hundred dollars, on an account stated, which account,

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with the contract of guaranty, was assigned to the plaintiff. The complaint avers that the guarantors had been duly notified of the indebtedness, and that Black had become wholly insolvent and a non-resident of the State.

The guarantors answered in four paragraphs: general denial, payment, set-off and accord and satisfaction. There was a verdict and judgment for the guarantors.

With their general verdict the jury returned answers to interrogatories submitted by the parties respectively. The errors assigned are, overruling the appellant's motion for judgment on the answers to the special interrogatories, notwithstanding the general verdict, and overruling the motion for a new trial.

On the trial the defendants were permitted to give evidence tending to prove that in 1878, when the debt sued for matured, their principal was a resident of the State and solvent; that they received no notice of his default until this suit was brought in 1884, and that meanwhile he had become wholly insolvent and a non-resident of the State.

The court gave the case in charge to the jury distinctly upon the theory that the guarantors were legally discharged, in the event the evidence established the foregoing facts.

By the answers to the special interrogatories, these facts were all expressly affirmed by the jury. The case presents two abstract propositions of law growing out of the contract upon which the suit is based. It is made a question whether or not the guarantors are liable, in the absence of notice that the contract of guaranty had been accepted. Another question is, whether or not they were entitled to notice of the default of their principal, and whether, if they were, the failure to give notice of the default and the subsequent non-residence and insolvency of Black operated to discharge the guarantors under the issues upon which the case was tried. As to the necessity of notice of acceptance: It is unquestionably true that a contract of guaranty is a transaction between the guarantor and guarantee, and is separate and, in many re-

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spects entirely distinct from the contract between the latter and the principal. In order to the completion of such a contract, it is essential, as in all other contracts, that the minds of the parties shall have mutually assented to its terms. Where, therefore, there is a mere proposal, on the part of those sought to be charged as guarantors, to guarantee the faithful performance of some obligation which another may enter into, provided credit shall be extended or a duty undertaken, the authorities all agree that the contract remains incomplete until the original obligation is entered into and the proposition of guaranty accepted and due notice thereof given. This is so, upon the familiar principle that, while the proposition remains pending, without notice of acceptance, that simultaneous concurrence of mind essential to the completion of a contract has not taken place. Where, however, the guaranty is for the fulfilment of a contract already made, or for one executed contemporaneously with the contract of guaranty, or for the payment of an existing debt, or where the contract of guaranty is upon a consideration distinct from the credit extended to the principal debtor, and which moves directly between the guarantor and guarantee, notice of acceptance is unnecessary. In such cases the acceptance of the guaranty, and the performance of the consideration upon which it rests, are all that are essential to make the contract complete and enforceable. *Davis v. Wells*, 104 U. S. 159; *Wills v. Ross*, 77 Ind. 1 (40 Am. R. 279); *Kline v. Raymond*, 70 Ind. 271; *Cooke v. Orne*, 37 Ill. 186.

The contract here in question purports to have been made, in part, at least, upon an independent consideration, the receipt of which the guarantors acknowledged. It bears upon its face indisputable evidence that the contract between the guarantee and the principal debtor had either been concluded or that the two contracts were executed as parts of the same transaction. The form of the obligation is that of a present undertaking, and purports to be an absolute guaranty of the fulfilment of an existing, consummated

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contract. Notice of its acceptance was, therefore, not necessary.

In respect to the second proposition: The first branch of the contract presents the case of an indirect collateral guaranty. It is an engagement, in terms, to guarantee the performance of a contract by a third person. The guarantors agree that Black will perform his contract, and that Black will make monthly settlements and deliver notes, or pay all moneys for which he may become liable under his contract. In short, the guarantors undertake to answer for the ability and fidelity of their principal in respect to the performance of his contract. They do not assume or engage to perform the contract in the event their principal makes default. This is the feature of their contract which makes it collateral and distinguishes it from the direct engagement of a surety to perform the undertaking or contract of his principal. *Ward v. Wilson*, 100 Ind. 52 (50 Am. R. 763); *LaRose v. Logansport National Bank*, 102 Ind. 332; *Reigart v. White*, 52 Pa. St. 438; *Woods v. Sherman*, 71 Pa. St. 100. •

There is, as was said in *Riddle v. Thompson*, 104 Pa. St. 330, a radical distinction between the liability of a surety and one who assumes a collateral obligation to guarantee the payment of the debt of another, yet the language of the agreement which shall constitute the one or the other has not always been clearly defined by the authorities. Where the form of the contract is that of an original and absolute undertaking to pay the debt of another, the liability of the promisor is that of a surety; but where the agreement is that another shall pay in the first instance, and the promisor becomes liable only for the default of the other, the contract is one of strict guaranty. *Allen v. Hulbert*, 49 Pa. St. 259.

Usually the contract of the guarantor is to answer for the default of his principal, if by the use of due diligence loss results from such default, while the surety is responsible at once upon his direct engagement to pay.

The latter branch of the contract is a direct guaranty of

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the payment of all notes that the guarantee should thereafter take from the principal debtor in payment of any indebtedness which might accrue under the contract into which the guarantee and debtor had entered. That part of the contract affords an apt illustration of a direct engagement on the part of guarantors or sureties themselves to pay or perform absolutely and at all events the contract of their principal. Such engagements are, in their nature, original, direct and absolute, and the promisor must himself take notice of the default of his principal. *Frash v. Polk*, 67 Ind. 55; *Burnham v. Gallentine*, 11 Ind. 295; *Kirby v. Studebaker*, 15 Ind. 45; *Kline v. Raymond*, 70 Ind. 271; *Watson v. Beabout*, 18 Ind. 281; *Ward v. Wilson*, *supra*.

The contract of Black, the principal, required him to make monthly settlements with Prier, and either pay or give notes for such sums as he might be liable for under his contract. The first branch of the contract of guaranty was, in effect, an engagement that Black would faithfully perform that part of his contract, and either pay or execute notes according to his agreement with Prier. By the latter branch of the contract, the payment of all notes so delivered by Black in part or full payment of sums for which he might become liable was guaranteed.

The liability for which suit was brought accrued under the first branch of the contract of guaranty. Black failed either to pay or to give notes, according to his agreement with Prier; hence, the suit for an unliquidated account, or at least for an account not settled according to the agreement. Of the failure to make such settlements the guarantors were entitled to notice, to the end that they might be advised of the nature and extent of the unliquidated and unascertained liability of their principal. They were willing, we must assume, to undertake directly and absolutely to pay notes, the amount of which might be conveniently ascertained and known, and for which they might take steps to indemnify themselves, but they were unwilling to answer absolutely for

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not received the proper credit for these men from the military authorities either at Washington or Indianapolis.

The board again met in special session on the 23d day of February, 1865, and, on the succeeding day, made an additional order as follows:

“Whereas, the former appropriation made by this board of January 3d, 1865, of \$60,000 for the raising and maintaining of military companies within the county of Cass for the service of the United States, in these words, (here insert) has proved insufficient, and a further appropriation is required; therefore, be it ordered by the Board of Commissioners of the County of Cass, in the State of Indiana, that there be, and the board hereby make, an additional appropriation from the county treasury of forty thousand (\$40,000) dollars for the raising and maintaining of military companies within the county of Cass for the service of the United States.

“And it is further ordered, that the disbursement of the above appropriation shall be governed in all respects by the same rules and regulations which governed the appropriation of January 3d, 1865, except as to the clause limiting the committee to the payment of \$325 to any one volunteer.

“And it is further ordered by the board that, whereas Cass county is entitled to a credit of eighty-one men for the re-enlisted veterans of the 46th regiment, as is acknowledged by the military authorities at Washington and Indianapolis, and we have been unjustly deprived of them, and have reason to believe that they have been given to substitute brokers at Indianapolis; therefore,

“*Resolved*, That we will fill our quota up to within eighty-one men, and then stop until an investigation is had, by military commission or otherwise, as to the reason for our being deprived of the same.”

Persons had either been already, or were soon thereafter, sent both to Washington and to Indianapolis to investigate and to endeavor to adjust the claim to additional credits thus

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emphasized and asserted by Cass county. The 46th regiment, referred to, was on duty at the city of Lexington, in the State of Kentucky, during the months of January, February and March, of the year 1865, and for some time thereafter, and there was evidence at the trial tending to prove that Mr. Pratt, one of the gentlemen originally named as a member of the recruiting committee, visited Lexington in the early part of March in that year for the purpose of, in some manner, getting the consent of the re-enlisted veterans of that regiment, whose places of residence were in Cass county, that they should be credited to that county, and that the appellee, and eighty-one other re-enlisted veterans, signed an agreement, in writing, authorizing Mr. Pratt to arrange to have them so credited. This agreement was alleged to be lost, and was hence not produced at the trial, but there was evidence further tending to show that it was in something like the following form:

“LEXINGTON, KY., March 10th, 1865.

“We, the undersigned, veterans of the 46th Regiment Indiana Volunteers, do hereby agree to accept the \$325 bounty offered by Cass county, Indiana, and give our names and credit to said county under the now pending call for 300,000 men, and authorize Daniel D. Pratt, as agent of said county, to be (at) all necessary steps to secure from the proper military authorities the credit of each and all our names to and for said county.”

On the 16th day of March, 1865, the adjutant-general of this State telegraphed from Indianapolis to a citizen of Logansport, who had presumably interested himself in filling the quota of men for which Cass county was responsible, that Governor Morton had obtained the veteran credits of eighty-two men of the 46th regiment of Indiana Veteran Volunteers, and it thereafter became an admitted fact that Cass county had received credits accordingly, and the canvassing for volunteers to fill up the county's quota proceeded upon that theory. It also became, and still is, a conceded fact that

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the appellee was one of the men for whom Cass county received a credit, as stated, and that the eighty-two men, referred to by the adjutant-general, included the eighty-one men for whom the county had theretofore claimed credit. In the fall of 1865, after the men, who had been so credited to Cass county, had been discharged from the military service, each claiming that he had become entitled to receive as a bounty from the county the sum of \$325, demanded that sum of the board of commissioners, but failed to obtain either payment or recognition of his claim.

For some unexplained reason these claims for bounty were permitted to drift along in an unsettled condition until the 6th day of December, 1881, when the appellee commenced this action by filing a claim against Cass county before the board of commissioners of that county for the sum of \$325, with interest from the time of the demand above set forth. The claim was rejected, and the appellee appealed to the circuit court, whence a change of venue was taken to the Miami Circuit Court. After the cause reached the circuit court the appellee filed an amended complaint, alleging in much greater detail the facts as we have given them, including those concerning which we have said there was evidence tending to prove. The appellant answered:

First. In denial.

Secondly. The six years statute of limitations.

Thirdly. A want of consideration.

A demurrer was sustained to the second paragraph of the answer, and a trial resulted in a verdict and judgment in favor of the appellee. Questions were reserved upon the pleadings and upon the sufficiency of the evidence to sustain the verdict.

The view we take of this case renders it unnecessary that we shall consider the sufficiency of the complaint. Touching its substantial character, we need only say that we do not regard it as counting upon a contract wholly in writing.

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Both of the appropriations made by the board of commissioners were, as must have been observed, for the raising and maintaining of military companies within the county of Cass for the service of the United States, and, hence, were plainly intended only to procure the voluntary enlistment of men not already in the military service. The call of the President was upon its face a call for additional men to be added to the military forces already in the field, and the appropriations were obviously made in aid of the object which the President thus had in view in making the call. The raising of additional troops involved an important question of public policy. The adjustment of the credits for troops already in the service presented a question of only incidental and much inferior importance. The offer, therefore, of bounties as an inducement to men to thereafter enter the army, and to thus increase its numerical force, was a very different thing from offering bounties to men already in the army as a means of swelling the credits to which the county was entitled under some previous call. Consequently the propositions contained in the orders of the board hereinabove set out were not addressed to men who were already in the military service of the United States, but to another and entirely different class of persons. It follows that the agreement alleged to have been entered into by the appellee and other veterans on the 10th day of March, 1865, was neither responsive to, nor an acceptance of, any proposition contained in those orders. That agreement was rather in the nature of a counter-proposition which would have required the further order of the board to have made it mutually binding as a contract between the parties. No such further order of the board was averred in the complaint, and, hence, the complaint was not based wholly upon a contract in writing, if, indeed, upon any well pleaded contract.

Under such circumstances the six years statute of limitations was a good defence to the action, and the circuit court erred in sustaining a demurrer to the paragraph of answer

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setting up that statute. *Board, etc., v. Shipley*, 77 Ind. 553; *High v. Board, etc.*, 92 Ind. 580; *Hackleman v. Board, etc.*, 94 Ind. 36.

At the trial there was no evidence either showing or tending to show that the proposition contained in the alleged agreement of the 10th of March, 1865, signed by the appellee and others, was ever accepted by the appellant, or any one acting in its behalf, or had anything whatever to do in procuring the appellee's previous re-enlistment to be credited to Cass county. On the contrary, the appellee's muster-in roll, which was read in evidence, described him as a resident of Washington township, Cass county, at the time of his re-enlistment, and, therefore, contained facts tending to prove that, in legal contemplation, the appellee was credited to Cass county when he was mustered into the service under his re-enlistment. *Board, etc., v. Hammond*, 83 Ind. 453; 13 United States Statutes at Large, 489, sections 13 and 14.

Neither was it shown that Mr. Pratt was at any time agent of Cass county, either for obtaining recruits or credits of men for that county.

If, as a matter of law, the appellee was credited to Cass county, at the time he was so mustered in, or that county then became entitled to have him so credited, any subsequent promise made to him for the purpose of obtaining his consent to be credited to Cass county was without consideration.

The conclusion to which we feel constrained to come, is that the verdict was not sustained by sufficient evidence, and that, for that reason, a new trial ought to have been ordered.

The judgment is reversed, with costs, and the cause is remanded for further proceedings.

Filed June 21, 1887.

No. 13,787.

RITTER v. THE STATE.

CRIMINAL LAW.—Embezzlement.—Indictment.—“Employee.”—Meaning of and Averments as to.—The word “employee” has a well defined meaning, and in an indictment for embezzlement against one employed by another, charging him with having embezzled the funds of his employer, it is sufficient to describe him as an “employee,” without setting out the facts constituting the employment.

SAME.—Supreme Court.—Practice.—Case not Reversed on Weight of Evidence.—In a criminal case the verdict will not be disturbed on appeal, nor the judgment reversed, merely on the weight or sufficiency of the evidence.

From the Elkhart Circuit Court.

H. C. Dodge, for appellant.

L. T. Michener, Attorney General, *F. D. Merritt*, Prosecuting Attorney, and *J. H. Gillett*, for the State.

Howk, J.—The indictment in this case charged that appellant, Ritter, “on the 23d day of September, 1886, at the county of Elkhart and State of Indiana, was then and there an employee of one John McCarter; that said Daniel Ritter, as such employee, then and there had the control and possession of divers moneys, bills, notes, United States treasury notes, and national bank notes, current money of the United States, amounting in all to the sum of \$315, of the property of the said John McCarter, to the possession of which the said John McCarter was then and there entitled; a more particular and accurate description of said moneys, bills, notes, United States treasury notes and national bank notes, is to this grand jury unknown and can not be given for the reason that they are in the possession of some person or persons to this grand jury unknown; that said Daniel Ritter did then and there, and while in the employment of said John McCarter, unlawfully, purposely, knowingly, fraudulently and feloniously purloin, secrete, embezzle and appropriate to his own use all of said moneys, bills, notes, United States treasury notes and national bank notes, then and there

111 324
111 502
111 556
114 548
116 115
116 117

111 324
127 226

111 324
139 533

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147 78
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167 419
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170 128
170 479

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in the possession of said Daniel Ritter as aforesaid, without then and there having the consent of said John McCarter so to do."

Appellant's motion to quash the foregoing count of the indictment herein was overruled by the court, and this ruling is the first error, of which complaint is here made by his learned counsel. It is manifest that, in and by this first count of the indictment, the State intended to charge appellant with the commission of the public offence, which is defined and its punishment prescribed in section 1944, R. S. 1881. In that section it is provided as follows: "Every officer, agent, attorney, clerk, servant, or employee of any person or persons, corporation or association, who, having access to, control, or possession of any money, article, or thing of value, to the possession of which his or her employer or employers is or are entitled, shall, while in such employment, take, purloin, secrete, or in any way whatever appropriate to his or her own use, or to the use of others, * * * any money, coin, bills, notes, credits, choses in action, or other property or article of value, belonging to or deposited with, or held by such person or persons, or corporation or association, in whose employment said officer, agent, attorney, clerk, servant, or employee may be, shall be deemed guilty of embezzlement, and, upon conviction thereof, shall be imprisoned in the State prison," etc.

It is claimed on behalf of appellant, that the trial court erred in overruling his motion to quash the first count of the indictment, because it charges that appellant was "an employee of one John McCarter," and does not state the facts which would enable the court to ascertain and determine whether or not he was such "employee" within the meaning of that word as used in the statute. In discussing this objection to the indictment, appellant's counsel says: "In criminal pleading it is necessary to specify facts from which the conclusion flows that one is an employee; it will not do to state the conclusion. It was necessary for the

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pleader to state, in the indictment, the capacity in which appellant was engaged; and it would be for the court to state, as matter of law, on motion to quash, whether or not under the averments of the indictment a public offence had been committed. The ultimate fact to be found, to constitute guilt, was the fact whether appellant was an employee, or not an employee. It will not do to charge, in the indictment, the ultimate fact."

We do not think this objection to the indictment is well taken or can be sustained. The word "employee," although of French derivation, was long since transplanted and adopted as an English or, at least, an American word. In this country it is of such common use that its meaning is not at all uncertain. Besides, the word "employee" is one of those used in the statute, in specifying the persons who may commit the public offence of embezzlement; and, as a general rule, under our decisions, in framing an indictment or information, it is safe to adopt and follow the terms and language of the statute. *Shinn v. State*, 68 Ind. 423; *Howard v. State*, 87 Ind. 68; *Toops v. State*, 92 Ind. 13; *State v. Miller*, 98 Ind. 70.

Webster thus defines the word "employee:" "One who is employed." If, in the case in hand, appellant was not employed by John McCarter, in any capacity or for any purpose, he was not guilty of the crime of embezzlement as defined in our statute; but if he was so employed, no matter in what capacity or for what purpose, and by virtue of his employment was entrusted with money of his employer, which he fraudulently and feloniously appropriated to his own use, he was no doubt guilty, under our statute, of the public offence of embezzlement. 1 Bishop Crim. Law, section 567; 2 Bishop Crim. Law, section 325.

It is doubtful whether the indictment under consideration does, or does not, show with sufficient certainty that appellant, by virtue of his employment; was entrusted with the money upon which the charge of embezzlement against him is predicated. *Smith v. State*, 28 Ind. 321; *State v. Wingo*,

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89 Ind. 204. This objection to the indictment, if it be one, is not made by appellant, and, therefore, is not considered. See, on the subject of such objection, *Jones v. State*, 59 Ind. 229.

Under the alleged error of the court below in overruling appellant's motion for a new trial, it is claimed by his counsel that the verdict of the jury was not sustained by sufficient evidence. We are of opinion, however, that the evidence in the record makes a stronger and more certain case of embezzlement against appellant, as the offence is defined in our statute, than the case stated in the indictment herein. There is no room for doubt, under the evidence, that appellant was an employee of John McCarter in a particular capacity and for a specific purpose; that as such employee, and by reason of his employment, appellant was entrusted by McCarter with the sum of money named in the indictment, in furtherance of the purpose for which he was employed; and that he never applied the money to such purpose, nor accounted for it in any way, but he disappeared from Elkhart county and was not seen or heard of by McCarter, who was interested in finding him, for about three months.

Appellant was a witness on the trial, but his account of the transaction was inconsistent and improbable, and was contradicted by the testimony of other witnesses. Manifestly the jury did not believe appellant's testimony, and they were the exclusive judges of the credibility of the witnesses, and of the weight and value of the evidence.

We can not disturb the verdict on the evidence. On every material point necessary to the conviction of appellant there is evidence in the record which fairly tends to sustain the verdict. In such a case it is settled by our decisions that, even in a criminal cause, the verdict will not be disturbed here, nor the judgment be reversed, merely on the weight or sufficiency of the evidence. *Clayton v. State*, 100 Ind. 201; *Hudson v. State*, 107 Ind. 372; *Garrett v. State*, 109 Ind. 527.

Moore, Trustee, v. Campbell.

We have carefully considered all the matters complained of here in the exhaustive brief of appellant's counsel, and our conclusion is that there is no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed June 23, 1887.

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118	79

No. 12,900.

MOORE, TRUSTEE, v. CAMPBELL.

CONTRACT.—Condition.—Construction.—Promise to Pay Money Upon Completion of Railroad to Certain Points.—The instrument sued on provided that the money sought to be recovered should become due and payable when a railroad should be built by a named company, and cars should be run from Kirklin, in Clinton county, to Carmel, in Hamilton county. It was further provided, that if said company should not construct said railroad from the former to the latter place and run a train of cars "to within one-fourth of a mile of Carmel within one year from this date, in Hamilton county, Indiana, and also to Indianapolis, in Marion county, Indiana, then this note shall be void."

Held, that there can be no recovery on the promise, unless the railroad was completed to both Carmel and Indianapolis within one year from the date of the instrument.

From the Marion Superior Court.

S. M. Bruce, for appellant.

W. Wallace and *L. Wallace*, for appellee.

ELLIOTT, J.—The question presented by the record in this case arises on a written promise executed by the appellee containing, among others, these provisions: "The said sum of two hundred dollars shall become due and payable when the Louisville, New Albany and Chicago Railway Company shall have built a railroad and run a train of cars from Kirklin, in Clinton county, Indiana, to Carmel, in Hamilton

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county, Indiana. And if said company shall not construct said railroad from Kirklin, in Clinton county, Indiana, to Carmel, in Hamilton county, Indiana, and run a train of cars to within one-fourth of a mile of the town of Carmel within one year from this date, in Hamilton county, Indiana, and also to Indianapolis, in Marion county, Indiana, then this note shall be void."

We think that the superior court was clearly right in holding that there could be no recovery on the promise unless the railroad was completed to Carmel and to Indianapolis within one year. The words "and also to Indianapolis" are to be taken in connection with what precedes them, and thus taken, there can be no doubt that the condition was that two things should be done within one year, namely, build the railroad to Carmel, and to Indianapolis. The words "and also" add to what the preceding words stipulated, and required that the two things specified should be done. It was not enough to do one of them; both must be done.

The words "and also to Indianapolis" can not be treated as mere surplusage, as counsel contends, for they are free from obscurity, are not inconsistent with any other part of the instrument, but, on the contrary, add an important element to the contract.

It is an elementary rule that all the words of a contract are to be given effect, unless the context very decisively shows that they are to be disregarded, and the courts will not declare words to be meaningless except in very clear cases.

Judgment affirmed.

Filed June 22, 1887.

Ferrier v. Deutchman.

No. 11,113.

FERRIER v. DEUTCHMAN.

SHERIFF'S SALE.—Void Judgment.—Where a judgment is void all proceedings thereunder, including a sale, are also void.

SAME.—Sale Made Under Several Judgments, Some Valid and Some Void.—A sale made under several judgments, some of which are void and the others valid and regular, is nevertheless void.

JUDGMENT.—Costs.—Criminal Law.—Jurisdiction.—Dismissal of Appeal.—A judgment for costs rendered against the defendant in a criminal prosecution, upon dismissal by a court having no criminal jurisdiction, is void.

From the Clark Circuit Court.

M. C. Hester, for appellant.

D. C. Anthony and *J. K. Marsh*, for appellee.

ZOLLARS, C. J.—Appellant brought this action to recover from appellee the real estate in controversy. He claims to be the owner, and entitled to the possession of the real estate, by virtue of a sheriff's deed based upon a sheriff's sale. Whether he has such right and title is dependent in the first place upon the validity or invalidity of the judgments under which the sale was made. If the judgments were void, all subsequent proceedings, including the sale under them, were also void. *Marsh v. Sherman*, 12 Ind. 358; *Rorer Judicial Sales*, sections 608, 879, 880, 910, 913, 927, 934.

The sheriff's sale was made under judgments for costs in four different cases. Three of them were criminal cases. If the judgment in one of the criminal cases was void all were void, as they were all alike. An examination of one of those cases, therefore, will be sufficient.

Appellant proposed to prove the existence and validity of those judgments by introducing in evidence the files and order-book entries of the common pleas court of Clark county. The files in one of the cases, so offered, as the record here presents them, are as follows:

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“STATE OF INDIANA }
 v. } Complaint for retailing liquor
 “MARTIN DEUTCHMAN. } without license.

“August 5th, 1870, this cause came before me on a change of venue from James Wilson, a justice of the peace of Charleston township, and a transcript of the proceedings before said justice, and the papers in said cause were filed before me, and the trial of said cause set for the sixth inst., at 9 o'clock A. M.

“August 6th, 1870. Come now the parties and the defendant pleads not guilty to said complaint, and on hearing the evidence, I find the defendant guilty as charged in said complaint, and assess his fine at ten dollars. It is, therefore, considered that the defendant make his fine to the State of Indiana in the sum of ten dollars, and pay the costs of this prosecution, and stand committed until said fine and costs are paid or replevied. JOEL M. SMITH, J. P.

“August 8th, 1870, the defendant took an appeal to the criminal circuit court and filed his recognizance with John C. Wagner surety, which is approved, and appeal granted. Transcript and papers filed in court August 8th, 1870.

“August 20th, 1870, the defendant also took an appeal to the Clark Common Pleas Court.

“STATE OF INDIANA, CLARK COUNTY.

“I certify that the above and foregoing is a full, true and complete transcript of the proceedings and judgment in the foregoing entitled cause, as found on my docket now legally in my possession.

“Witness my hand and seal this 6th day of September, 1870. JOEL M. SMITH, J. P. [SEAL]

“Costs \$7.65.”

The entry in the cause upon the order-book of the common pleas court of Clark county is as follows :

“STATE OF INDIANA }
 v. }
 “MARTIN DEUTCHMAN. }

“Comes now Robert J. Shaw, Esq., who prosecutes the

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pleas of the State in this behalf, and moves the court to dismiss this cause, for the reason that this court has no jurisdiction thereof, and this cause is dismissed. It is further considered by the court that the plaintiff recover of the defendant all costs in and about this court expended."

The court below ruled out the above "files and entries," and appellant excepted, and assigned the ruling as a cause for a new trial.

It very clearly appears from the offered evidence, as it did not appear upon the former appeals (*Ferrier v. Deutchman*, 51 Ind. 21, *Ferrier v. Deutchman*, 81 Ind. 390), that three of the judgments under which the sale was made by the sheriff were in criminal cases.

How those cases came to be docketed in the common pleas court is not shown by the record, except by the entry of the justice of the peace. It is shown by his entries that after appellee had been convicted by him, he took appeals to the criminal court, and that those appeals were perfected by the filing of bonds or recognizances, and the transmission and filing of the papers in the criminal court. There is a further entry that, subsequent to the perfecting of the appeals to the criminal court, appellee "took appeals to the common pleas court," but it is not recited that he filed additional appeal bonds or recognizances, or that the papers were transmitted to, and filed in, the common pleas court; indeed, it is apparent that the papers in the cases could not have been so transmitted and filed, for the reason that they had already been transmitted to, and filed in, the criminal court. The cases, however, seem to have been docketed in the common pleas court, and it is not material for the purposes of this decision whether or not proper transcripts and papers were filed in that court.

Prior to 1869 the common pleas court had jurisdiction in cases of misdemeanors. Before the appeals were taken, a criminal court had been established in Clark county, and had exclusive jurisdiction in all criminal prosecutions in the

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county, both original and on appeal from justices' courts. After the establishment of the criminal court the common pleas court had no criminal jurisdiction either original or on appeal from justices' courts. That seems to have been understood by the judge of that court and by the prosecuting attorney, and, hence, the motion by the prosecuting attorney and the orders of the court dismissing the causes.

For some reason, not apparent, the judge went further, and rendered judgments in favor of the State and against appellee for the costs made in that court. Were those judgments void? We think they were. In the first place, the common pleas court had no jurisdiction to render a judgment of any kind in criminal causes. It could no more render a judgment for costs against a defendant than it could render a judgment of conviction. It was the duty of that court, upon finding criminal causes upon its dockets, to dismiss them if brought there originally, or to dismiss the appeals if brought there by appeals, and thus clear its dockets of causes over which it had no jurisdiction.

The rendition of judgments for costs in favor of the State and against appellee was the exercise of jurisdiction, and jurisdiction the court did not have. Counsel for appellant cite *Dixon v. Hill*, 8 Ind. 147, and *Dyer v. Board, etc.*, 84. Ind. 542. Those were civil cases, and are neither conclusive nor authority here. In one case the common pleas court had jurisdiction to proceed until the title to real estate came in question, and, of course, up to that point had authority to tax costs. In the other case the circuit court had general jurisdiction of the subject-matter. The infirmity was in the proceedings in the particular case. But here, as we have said, the common pleas court did not have, and could not by any act of the parties be clothed with jurisdiction of the subject-matter. And, in the second place, the statute then in force provided that in all criminal causes where the person accused should be acquitted no costs should be taxed against him. 1 G. & H., p. 338, section 25.

Upon the motion of the prosecuting attorney the court dismissed the causes. If we assume that the court had authority to dismiss the causes, and take the orders of the court literally, they amounted to an acquittal; on the other hand, if the orders be interpreted as dismissals of the appeals, they were equivalent to acquittals so far as that court was concerned. In either case the court had no authority to adjudge costs against the defendant.

This is not a case of irregularities in the proceedings. Here the judgments were rendered by a court without jurisdiction over the subject-matter, and in violation of a statute. It is not a case of voidable judgments, but a case of void judgments, the infirmities being apparent upon the face of the record. The judgments being void, all subsequent proceedings based upon them were also void.

This conclusion renders it unnecessary for us to examine the fourth judgment for costs, and the proceedings under it, upon which appellant, in part, bases his claim of title.

Writs upon that judgment, and upon the three judgments for costs in the criminal cases, were issued to the sheriff. He levied them at the same time upon appellee's real estate, and sold it upon all of them.

The three writs were void, because the judgments upon which they were issued were void. The sale by the sheriff was, therefore, under our decision, void, even conceding that the other judgment and all proceedings under it were regular and valid. *Brown v. McKay*, 16 Ind. 484; *Hutchens v. Doe*, 3 Ind. 528.

The sale being void for the reasons above stated, the judgment could not have been otherwise than for appellee, although the other judgment and the proceedings under it were, so far as they were concerned, regular and valid. It is, therefore, immaterial whether the court below ruled correctly or erroneously in excluding anything pertaining to or based upon that other judgment.

Judgment affirmed with costs.

The State, *ex rel.* Robinson, *v.* Carr, Auditor of State.

ELLIOTT, J., did not participate in the decision of this cause.

Filed June 22, 1887.

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No. 13,809.

THE STATE, EX REL. ROBINSON, *v.* CARR, AUDITOR OF STATE.

STATE UNIVERSITY.—*Character of Corporation.—Endowment Fund.—Interest.*

—The State University is not a public corporation, but a private, or at most a *quasi* public one, and its endowment fund is not embraced by the phrase “public funds” as used in section 5205, R. S. 1881, fixing the rate of interest upon the latter class of funds at eight per cent.

SAME.—*Repeal of Statute.—Interest on Public Funds.—Auditor of State.—Section 4600, R. S. 1881, requiring the auditor of state to loan the university fund, for which provision is made by section 4595, at seven per cent. interest, was not repealed by the later enactment, section 5205, fixing the rate of interest on public funds at eight per cent. and repealing “all acts on the subject of interest, including such as relate to interest on public funds.”*

From the Marion Circuit Court.

W. B. Hord, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for appellee.

MITCHELL, J.—The only question for decision in this case relates to the rate of interest which the auditor of state is required to demand upon loans of the “university fund.”

The law under which the State University was established provides that the university fund shall consist of certain lands in Monroe and Gibson counties, and the proceeds of sales thereof, and all donations for the use of the university, when the same is expressly mentioned in the grant, or where in such grant the term “university” only is used. Section 4595, R. S. 1881. It is made the duty of the auditor when the fund is paid into the State treasury to loan the principal,

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the annual interest to be applied to the current expenses of the university, upon warrants drawn by the auditor upon the treasurer of state, on the requisition of the board of trustees of the university. The manner of making the loans and the character of the security to be taken are particularly prescribed. Section 4600, R. S. 1881, provides that, "The rate of interest required shall be seven per cent. in advance, payable annually."

The later act of 1879, section 5205, R. S. 1881, provides that, "All acts on the subject of interest, including such as relate to interest on public funds, interest on purchase-money of canal, college, school, or saline lands, are hereby repealed; and, hereafter, the interest on public funds, purchase-money of canal, college, school, or saline lands, and upon the permanent school fund, shall be at the rate of eight dollars a year on one hundred dollars."

It became a question in the mind of the auditor of state, as to whether the act of 1879, above set out, did not by implication repeal section 4600, so as to make it his duty to decline to make any loan of the university fund at a less rate of interest than eight per cent.

It will be observed, that it is the interest on "public funds, purchase-money of canal, college, school and saline lands, and upon the permanent school fund," that is fixed at eight per cent. The fund designated in section 4595 as the university fund, is not among those specifically enumerated. Unless, therefore, that fund is embraced by the phrase "public funds," it would seem to be clear that it is not affected by section 5205. In our opinion it is not a public fund within the meaning of that section.

The university, although established by public law, and endowed and supported by the State, is not a public corporation in a technical sense. In the language of the court, in *Regents of the University of Maryland v. Williams*, 9 Gill & Johns. 365, 388; "A corporation may be private, and yet the act or charter of incorporation contain provisions of a

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purely public character, introduced solely for the public good. * * * A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government subject to the control of the Legislature, and its members officers of the government, for the administration or discharge of public duties, as in the cases of cities, towns," etc. *Yarmouth v. North Yarmouth*, 34 Maine, 411; *North Yarmouth v. Skillings*, 45 Maine, 133.

There are three classes of corporations, to wit, public municipal corporations, the object of which is to promote public interest; corporations technically private but of a *quasi* public character, having in view some public enterprise in which the public interests are involved, and corporations strictly private. 1 Dill. Munic. Corp., secs. 52, 53. *Dartmouth College v. Woodward*, 4 Wheat. 518; *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543; *Foster v. Fowler*, 60 Pa. St. 27.

The act under which the State University was established, made provision for a board of trustees, and enacted that "they and their successors shall be a body politic, with the style of 'The Trustees of Indiana University,' in that name to sue and be sued," etc. This corporate body is invested with the power to possess, take and hold, in their corporate name, all the real and personal property of the university for its benefit, and is authorized to expend the income thereof for the benefit of the institution. It is authorized to make all by-laws necessary to carry into effect the general purposes for which the institution was organized. The corporation thus organized has none of the essential characteristics of a public corporation. It is not a municipal corporation. Its members are not officers of the government, or subject to the control of the Legislature in the management of its affairs, and the university fund, derived in the manner pointed out in section 4595, does not belong to the State.

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That the university was established under the direct authority of the State, through a special act of the Legislature, or that the charter contains provisions of a purely public character, nor yet that the institution was wisely established, and is and should be perpetually maintained at the public expense, for the public good, does not make it a public corporation, or constitute its endowment fund a public fund.

While it is made the duty of the auditor of state to loan out the fund when paid into the treasury of the state, and although the disposition of the lands and the management of the fund are placed in the hands of public officers of the State, the university fund, nevertheless, remains, and must continue a special fund for the exclusive benefit of the university. The legal status of the State University being that of a technically private, or, at most, *quasi* public corporation, the university fund, of which it is the sole beneficiary, is, therefore, not a public fund, within the meaning of the law.

It can not be supposed that the act of 1879, repealing "all acts on the subject of interest, including such as relate to interest on public funds," etc., was intended to repeal any part of the several acts establishing the State University, or to affect the interest on its special endowment fund. There is no pretence, of course, that the law regulating the rate of interest at which the university fund is to be loaned, is repealed in express terms. If repealed at all it is by implication. No maxim receives more universal recognition, or is more rigidly adhered to by the courts, in the construction of statutes, than that the law does not favor repeals by implication. To statutes enacted, like that under consideration, for a special purpose, this rule has peculiar application. The legislature having by a special statute erected a corporation of the character described, and having made it the beneficiary of a special fund, with the loaning and management of which it has charged the auditor of state, whose duties in that re-

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spect are specifically pointed out, that statute, with the amendments thereto, until it is expressly repealed or modified, must be regarded as furnishing the guide for the auditor's conduct.

It is worthy of consideration that the statute which is supposed to effect a repeal of the section regulating the rate of interest at which the auditor shall loan the university fund, contains, after the phrase "public funds," a specific enumeration of the funds upon which the rate of interest is fixed at eight per cent. These are "purchase-money of canal, college, school or saline lands, and upon the permanent school fund." The phrase "public funds" may be regarded as embracing, in a general sense, the particular funds subsequently enumerated.

This is according to "a well known rule for the construction of statutes, which, though ancient, is always adhered to," by which the general words in one clause of a statute may be limited and restrained by the particular words in the same or a subsequent clause. Sedgwick Statutory Construction, p. 360.

The application of this rule, as well as the other considerations mentioned, leads to the conclusion that the statute regulating the rate of interest to be paid upon the loan of the university fund, was in no wise affected by the later act, relating to the subject of interest upon public funds.

This conclusion results in the reversal of the ruling and judgment of the Marion Circuit Court.

Judgment reversed, with costs.

Filed June 17, 1887.

No. 13,375.

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ROBERTS v. THE STATE.

CRIMINAL LAW.—Instruction to Jury.—Invasion of Province of Jury.—An instruction to the jury in a criminal cause, to the effect that, under the evidence adduced, if they find the defendant guilty, it is an aggravated offence, and that they have the right to fix a proper penalty, is an invasion of the province of the jury, and erroneous.

SAME.—Presence of Prisoner Throughout Trial.—In a criminal prosecution, where the offence charged is punishable by death, or by confinement in the State prison or county jail, the defendant must be personally present during the trial, unless he in some way waives the right, and if any substantial part of the trial is had in his absence without his consent, notwithstanding the presence of his counsel, it is such an error as requires a reversal of the judgment on appeal.

SAME.—Instructing Jury Part of Trial.—Withdrawal of Erroneous Instruction.—Instructing the jury is a part of the trial, and if the jury, after retirement, are called back into the court-room, and an erroneous instruction withdrawn or corrected by a statement of the court, in the absence of the defendant, who is charged with a crime of the class above mentioned, it is error.

From the Vigo Circuit Court.

J. R. Courtney, for appellant.

L. T. Michener, Attorney General, D. W. Henry, Prosecuting Attorney, D. N. Taylor, W. B. Hord and J. H. Gillett, for the State.

ZOLLARS, C. J.—Appellant was convicted upon a charge of burglary, and sentenced to the State prison for a period of seven years.

The seventh instruction given by the court was as follows: “Under the evidence in this cause, if you find the defendant guilty, it is an aggravated burglary, and you have a right to fix a proper penalty.”

That the instruction was erroneous, because it invaded the province of the jury, and was, in effect, an instruction to them to inflict a severe penalty, seems clear. For analogous cases see *Cline v. Lindsey*, 110 Ind. 337, and cases there cited.

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After the jury retired, and had had the case under consideration for some time, the trial court had them recalled to the court-room, and having stated to them that he had given the above instruction, repeating it, instructed them further, as follows: "I want to say to you, that I guess this is not correct, and you will disregard it. It is a question for the jury to determine the nature of the crime, and the punishment they will inflict therefor."

The foregoing was clearly an instruction. To withdraw a charge given, and instruct the jury that it is not the law and should be disregarded by them, is as much an instruction as the giving of the charge in the first place. Here, not only was the instruction withdrawn as not being the law, but the jury were further instructed that it was for them to determine the nature of the crime and the punishment to be inflicted. See *Stephenson v. State*, 110 Ind. 358.

When the jury retired in the first instance, appellant was returned to the county jail. He had no notice that the jury were to be recalled, nor that they were recalled for further instructions, and was not present when they were recalled and the further instruction given.

Was the giving of the instruction in his absence such error as requires the reversal of the judgment?

The statute provides, section 1786, R. S. 1881, that no person prosecuted for any offence punishable by death, or by confinement in the State prison or county jail, shall be tried unless personally present during the trial. In such cases, the presence of the defendant's counsel does not meet the requirement of the statute. He must be personally present unless he in some way waives that right. Such is the positive requirement of the statute. No court can dispense with it. If the trial, or any substantial part of it, is had in the absence of the accused without his consent, the statute is violated and his rights invaded.

Such an invasion can not be regarded by the courts as a harmless error. Instructing the jury is clearly a part of the

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trial. If one instruction may be given in the absence of the accused and without his knowledge, there is no good reason why the whole of the instructions may not be given in his absence and without his knowledge. And if this court, looking to one instruction so given, may say that the giving of it in the absence of the accused did not affect his substantial rights, and was, therefore, a harmless error, there would seem to be no good reason why, looking to all of the instructions in the case, given in the absence of the accused, the giving of them did not affect his substantial rights, and was, therefore, a harmless error. To treat such errors as harmless would be to entirely overthrow the statute.

Some of the States have statutes similar to ours, but whether such statutes exist or not, the holdings have generally been, that the trial in a felony case can not proceed to any substantial extent in the absence and without the consent of the accused; and that to so proceed with the trial in his absence is an error for which the judgment must be reversed. 1 Bishop Crim. Proc., section 273; *State v. Wilson*, 50 Ind. 487 (19 Am. R. 719); *Maurer v. People*, 43 N. Y. 1; *Goss v. State*, 40 Texas, 520; *Prine v. Commonwealth*, 18 Pa. St. 103; *State v. Buckner*, 25 Mo. 167; *State v. Barnes*, 59 Mo. 154; *Rolls v. State*, 52 Miss. 391; *Dodge v. People*, 4 Neb. 220; *State v. Hughes*, 2 Ala. 102; *People v. Perkins*, 1 Wend. 91; *Holliday v. People*, 4 Gil. (Ill.) 111; *Clark v. State*, 4 Humph. (Tenn.) 254; 1 Chitty Crim. Law, 411; *Graham v. State*, 40 Ala. 659; Wharton Crim. Pl. & Pr., section 714.

The above statute, in relation to the presence of the accused in criminal prosecutions, is no less emphatic and unqualified than is the statute requiring the court to charge the jury in writing, upon the request of the defendant. In construing that statute we have been constrained to hold that a violation of it by giving a part of the instructions orally, can not be treated as a harmless error. The reasoning by

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which that conclusion was reached is applicable here. See *Stephenson v. State, supra.*

On account of the error in instructing the jury in the absence of appellant the judgment must be reversed.

Other questions have been discussed, but as they are not likely to arise upon another trial, they need not be decided.

The judgment is reversed, and the clerk is directed to make the proper order for the return of appellant.

Filed June 23, 1887.

No. 12,899.

ROGERS ET AL. v. THE UNION CENTRAL LIFE INSURANCE COMPANY.

SUPREME COURT.—*Assignment of Error.*—*Joint Assignment.*—*Effect of.*—*Complaint Good as to One Appellant.*—Where a complaint is good as to one appellant, a joint assignment of errors will not prevail against it.

PLEADING.—*Complaint.*—*Demurrer.*—A complaint which shows that the plaintiff is entitled to some relief will repel a demurrer.

MARRIED WOMAN.—*Estoppel.*—A married woman, whose representations were relied upon by one who contracted with her in good faith, is estopped to deny the character of her contract.

FORECLOSURE OF MORTGAGE.—*Equitable Cognizance.*—*Not Triable by Jury.*—A suit for the foreclosure of a mortgage is of equitable cognizance, and the issues therein are not triable by jury.

From the Vigo Superior Court.

C. F. McNutt, J. G. McNutt, S. C. Davis, S. B. Davis and I. N. Pierce, for appellants.

H. B. Jones, for appellee.

ELLIOTT, J.—The appellee's complaint is founded upon promissory notes executed by Mary Jane Rogers, and a mortgage securing them executed by her and her husband, Newton Rogers.

The complaint is attacked by the assignment of errors

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111	553
114	299
115	378
117	12
119	5
111	343
124	111
111	343
128	29
128	323
111	343
131	271
131	541
111	343
134	35
111	343
138	218
111	343
142	502
111	343
150	587
111	343
160	532
111	343
163	118

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jointly made by the appellants, and as the complaint is certainly good as to one of them, the attack must fail, even if it were conceded that it is bad as to one of them. It is well settled that a joint assignment of errors will not prevail if the complaint is good as to one of the appellants. *Hoes v. Boyer*, 108 Ind. 494; *Hochstedler v. Hochstedler*, 108 Ind. 506. We need not, therefore, inquire whether the complaint is bad as to one of the appellants, for if we find it good as to either we must hold the attack upon it to be unavailing.

The only points made against the complaint which affect both appellants, are, that it fails to aver that the notes are due and unpaid, and, also, fails to show to whom the notes are payable.

The second point is based on a misapprehension of the record, for the notes filed with the complaint show who the payee is, and it is also shown in the body of the pleading that the appellee is the payee of the notes. The first point is not well taken, because, as to some of the notes it is distinctly averred that they are due and unpaid, and this would entitle the plaintiff to some part at least of the relief demanded. It is well settled that a complaint which shows the plaintiff entitled to some relief will repel a demurrer. *Bayless v. Glenn*, 72 Ind. 5. But we think the complaint shows by fair implication that all of the notes were due and unpaid, and this is certainly sufficient after verdict.

Mary J. Rogers alleges in her separate answer that at the time she executed the notes and mortgage she was a married woman and the owner of the property mortgaged; that she executed the notes and mortgage as surety for her husband, and for no other consideration.

The appellee replied to this answer in six paragraphs. To the third, fourth, fifth and sixth paragraphs of this reply the appellants demurred; the demurrers were not, however, addressed to each paragraph of the reply, but to all the paragraphs collectively. If any one of these paragraphs was good there was no error in overruling the demurrer.

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We think that some of the paragraphs were good. The facts pleaded show that the appellee was informed by Mrs. Rogers that the money she sought to obtain was for her own benefit; that she was not undertaking as the surety of her husband; that the appellee believed her statements, and, relying on their truth, loaned her the money she desired; and they show, also, that the appellee rightfully relied on her representations. Our decisions establish the rule that a married woman may estop herself by her conduct from denying that a loan effected by her was for her benefit. As said in *Orr v. White*, 106 Ind. 341, "She may now be bound by an estoppel *in pais*, like any other person." This has been expressly ruled in other cases. *Vogel v. Leichner*, 102 Ind. 55; *Cupp v. Campbell*, 103 Ind. 213; *Ward v. Berkshire Life Ins. Co.*, 108 Ind. 301.

In the case last cited, the facts were very similar to those pleaded in the reply before us, and after a full discussion of the question, it was held that the married woman was estopped to deny that the money was obtained for her own benefit. We did not hold in that case that the form or recitals of the contract will work an estoppel, nor do we so hold in this. What we do hold is, that by her conduct and representations, relied upon by one who contracted with her in good faith, she is estopped to deny the character of her contract. If the party with whom she contracts does not act in good faith, or if he knows or has the means of ascertaining the truth, he can not successfully insist upon an estoppel. But the presumption is against bad faith, and until the contrary appears, that presumption must prevail.

We think that we were right in holding that where it appears that the disability of coverture exists, it devolves upon the party seeking the judgment to show that the contract was one which the married woman had capacity to make. *Vogel v. Leichner*, *supra*; *Cupp v. Campbell*, *supra*. But this does not prevent the party from showing that he relied upon the conduct of the married woman. It would be a fraud

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which she will not be allowed to perpetrate for her to repudiate her representations as against one who has in good faith relied upon them. Our decisions all recognize the rule that, under the provisions of the act of 1881, a married woman may be estopped, and that when she attempts to deny what she has previously affirmed she is guilty of a legal fraud. Upon the admitted facts stated in the reply, the appellant Mary J. Rogers was estopped to deny the character of the contract into which she entered.

There was no error in refusing a jury trial. The suit was of equitable cognizance and the whole issue became one for the chancellor and not for the jury. This we regard as firmly settled. *Carmichael v. Adams*, 91 Ind. 526; *Field v. Holzman*, 93 Ind. 205; *Quarl v. Abbett*, 102 Ind. 233, 239 (52 Am. R. 662); *Brown v. Russell*, 105 Ind. 46, and cases cited.

It is contended that the judgment should be reversed because the bill of exceptions does not show that any evidence was given, but does show that testimony was offered. The appellants take a very erroneous view of the subject. Upon them rests the burden of showing error in the record, and if all the evidence was necessary to show this, it was for them to bring it into the record. If the evidence is not all in the record, the presumption that the trial court did right will prevail. If the bill of exceptions is defective the appellants must suffer and not the appellee.

Judgment affirmed.

Filed June 23, 1887.

Crooks, Auditor, v. Kennett.

No. 13,705.

CROOKS, AUDITOR, v. KENNETT.

MARRIED WOMAN.—*Separate Real Estate.*—*Mortgage Executed Upon to Secure Debt of Another.*—A mortgage executed by a married woman upon her separate real estate to secure the debt of her husband or others is invalid, and can not be enforced.

HUSBAND AND WIFE.—*Tenants by Entireties.*—*Mortgage by to Secure Debt of Husband or Others.*—A mortgage executed by a husband and wife upon real estate owned by them as tenants by entireties, to secure the payment of a debt due from the husband or others, is invalid, both as to the husband and wife.

SAME.—*Coverture a Personal Defence.*—*Not Available for Third Parties.*—*Mortgage.*—*Grantor and Grantee.*—Coverture is a personal defence, of which third parties can not avail themselves for their own benefit, and where a husband and wife mortgage real estate, and afterwards sell it, the grantee can not avail himself of the defence against the mortgage that it was executed to secure the payment of a debt due from the husband alone, and that at the time of its execution the husband and wife owned the real estate as tenants by entireties.

SAME.—*Cancellation of Mortgage.*—Where a husband and wife, owning real estate as tenants by entireties, sell and convey the same, their grantee can not maintain an action against one holding a prior mortgage thereon executed by such husband and wife to secure a debt of the husband, to have his title quieted and such mortgage cancelled on account of such facts, notwithstanding an averment in his complaint that such mortgagee recognizes and admits that the mortgage is void, and refuses either to cancel or to bring an action for its foreclosure.

SCHOOL FUND MORTGAGE.—*Action to Set Aside.*—*County Auditor Not Proper Party.*—In an action to set aside and cancel a mortgage executed to the State, to secure a loan from the school fund, the county auditor is not a proper defendant, and a judgment against such officer in such action will not bind the State, it not being a party.

Seemle, that the State can not be made a party to such an action.

From the Hamilton Circuit Court.

W. S. Christian and J. W. Christian, for appellant.

T. J. Kane and T. P. Davis, for appellee

ZOLLARS, C. J.—Appellee brought this action against appellant as the auditor of the county, to have his title to

111	347
111	553
112	422
114	163
116	411
120	573
123	496
111	347
124	110
111	347
128	29
111	347
131	193
111	347
136	602
111	347
139	638
111	347
150	396
152	374
152	378
111	347
154	507
111	347
166	536

Crooks, Auditor, v. Kennett.

the land described in the complaint quieted as against a school fund mortgage.

The facts stated in the complaint, so far as they are material here, are that the real estate was owned by Eunice Jackson and Joel C. Jackson, husband and wife, as tenants by entireties; that, on the 19th day of October, 1883, the husband borrowed \$300 of the school fund, and to secure the repayment of the same, he and his wife executed a mortgage upon the real estate, payable to the State, which mortgage was properly recorded; that, in 1886, after the mortgage had been so recorded, appellee purchased the real estate from the Jacksons, paying full value, and received from them a deed for the same with covenants of warranty; that, at the time the purchase was made, the mortgage had become due by reason of the non-payment of interest for two years; that the Jacksons refused to convey the real estate to appellee subject to the mortgage, or to pay the same, or to allow appellee to pay the same, for the reason, as claimed by them, that the mortgage was void; that, although the interest was, and is due upon the mortgage as above stated, by reason of which it was the duty of the auditor to make an effort to collect, by foreclosing the mortgage, he has refused, and still refuses, to institute such proceedings, upon the ground that the mortgage is void, and the borrower, Joel C. Jackson, is insolvent; that the auditor also refuses to cancel the mortgage, and that, although void, it is a cloud upon appellee's title.

The court below overruled a demurrer to the complaint, rendered judgment quieting the title to the real estate, as against the mortgage and all claims under it, in behalf of the auditor and his successors in office, and directing the clerk to cancel and discharge the mortgage of record.

Did the court below err in overruling the demurrer to the complaint?

These propositions are settled as the law of this State, under the statutes in force since 1881:

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The judgment is reversed, at appellee's costs, and the cause is remanded, with instructions to the court below to sustain appellant's demurrer to the complaint.

Filed June 28, 1887.

No. 12,786.

BUNCH v. GRAVE ET AL.

111	351
114	357
118	332
120	505
111	351
130	373
111	351
131	456
111	351
141	327

SHERIFF'S SALE.—Purchaser.—Prior Encumbrance.—Effect of Payment by Purchaser.—Where the equity of redemption in real estate is sold on execution, the purchaser takes the land charged with all prior encumbrances. The amount bid will be presumed to be the price or value of the property, less the encumbrances, and where the purchaser obtains title to the land, and subsequently pays off pre-existing liens of which he had notice, he will not be permitted to keep them alive by having them assigned to himself, when to do so would operate as an injury to another who has the right to have them treated as extinguished.

SAME.—Married Woman.—Mortgage.—G. purchased at sheriff's sale on execution a tract of land sold as the property of B., subject to the lien of two prior mortgages executed by B. and wife. Afterwards the wife of B. had her one-third interest in the land set off to her under the provisions of the act of March 11, 1875. Subsequently, G.'s title having matured, he purchased and had assigned to him one of the prior mortgages, which he caused to be foreclosed taking the decree in his own name. The other was foreclosed, and the decree and judgment purchased by and assigned to G. Both decrees adjudged that G.'s interest in the land should be first sold for the payment of the debts. His interest exceeded in value the amount of the judgments.

Held, that by the purchase of the mortgage debts by G., they were thereby extinguished as to Mrs. B., and no longer operated as liens upon her interest in the land.

MARRIED WOMAN.—Act of March 11, 1875.—Inchoate Interest.—Sheriff's Sale.—Prior Mortgage.—A married woman, who, under the act of March 11, 1875, has had her interest in her husband's real estate, which has been sold on execution, set off to her, occupies a relation analogous to that of surety as to prior mortgages on the whole tract, in which she has joined, and the two-thirds of the land taken by the purchaser at the sheriff's sale is charged with the payment of all such prior encumbrances, provided it is of sufficient value.

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REMEDY.—*Misconception of Party.*—A party who imagines he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy, because he first tries a wrong one, which is not inconsistent with his true and effectual remedy which he should have pursued in the first instance.

From the Randolph Circuit Court.

E. L. Watson and J. S. Engle, for appellant.

H. C. Fox, J. F. Robbins, W. A. Thompson, A. O. Marsh and J. W. Thompson, for appellees.

MITCHELL, J.—In October, 1877, Augustus Bunch was the owner of a tract of land in Randolph county which was encumbered by two mortgages, in the execution of which he and his wife had united. The mortgages were given to secure the husband's debts. There were, at the date above mentioned, several judgments against Bunch, which imposed junior liens upon the land. Grave procured these judgments to be assigned to him, and caused executions to be issued thereon. The land was sold at sheriff's sale, Grave becoming the purchaser. Bunch failed to redeem, and the purchaser received a sheriff's deed. The sale having been made after the act of March 11th, 1875, came in force, Mrs. Bunch, the wife of the judgment debtor, became vested with a fee-simple title to the undivided one-third of the land purchased by Grave, subject to the encumbrance of the prior mortgages. She had the interest thus vested in her set off by proceedings in partition. Grave went into possession of the two-thirds set off to him. Subsequently the prior mortgages were foreclosed, and in the decrees of foreclosure, both of which drew ten per cent. interest, it was adjudged that the land set off to Grave should be first sold to satisfy the mortgage debts, which aggregated \$1,542.35. The land set off to Grave is alleged to be worth \$3,000. One of the mortgages was assigned to Grave before it was foreclosed, and the decree was taken in his name. The other was purchased and assigned to him after it was foreclosed, Grave being in possession of the two-thirds set off to him, and assuming to

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be the owner of the several decrees above mentioned, which he treated as being on foot, declared his purpose to hold them alive until the several decrees and accumulating interest should amount to a sum equal to the value of the whole tract, when he proclaimed his purpose to sell the whole to satisfy the several mortgage decrees.

Through some singular and unaccountable misconception of her rights, Mrs. Bunch then filed a petition in the Randolph Circuit Court, asking that Grave be compelled to proceed and sell the land, according to the terms of the several decrees, claiming that the two-thirds set off to him was more than sufficient in value to satisfy both, and asserting that the purpose of Grave to hold the decrees until the interest should accumulate was inequitable, and injurious to her. The court made an order according to the prayer of the petition. Grave appealed to this court, and the order of the circuit court was affirmed. *Grave v. Bunch*, 83 Ind. 4. Afterwards Grave issued orders of sale on the foreclosure decrees, which both parties seemed to treat as alive and in force. He caused his own land to be sold, bidding it in himself for one hundred dollars.

The foregoing, with many other immaterial facts, are set forth in a petition by Mrs. Bunch to the Randolph Circuit Court, upon which she again asked the intervention of the court. She prayed that it might be adjudged on the foregoing facts that the land set off to her was discharged from the lien of the several decrees, which Grave assumed to hold, and which he was threatening to enforce against her land, and asked that her title might be quieted. The court below sustained a demurrer to the petition, and the question is, whether, upon the facts above summarized, the appellant is entitled to any relief.

The most serious impediment in the appellant's way is the anomalous proceeding by which she sought to compel the appellee to sell the two-thirds of the land to which he had

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obtained title under the sheriff's sale, in order to satisfy debts which he claimed to be owing to himself.

It is now insisted that Grave ought to be denied any further remedy on the several mortgage decrees because of his delay in proceeding to sell. It is said that the appellant is without the means to bid in the land; that meanwhile a purchaser, whom she had procured, and who stood ready to purchase the land owned by Grave for the full amount of the decree and costs, has invested his money otherwise, and now declines to purchase, and that hence an injury has resulted to Mrs. Bunch. On the other hand it is asserted, or rather assumed, that Grave occupies the relation of creditor to the land, and that he is not to be prejudiced in the collection of his debt by mere passive delay; that it was the surety's business, it being apparently assumed on all hands that Mrs. Bunch occupies the relation of surety, to pay the debt and then proceed against the property. On both sides, as it will thus be seen, the true relation of the parties to the property, and to each other, is singularly ignored.

Grave, it will be remembered, purchased real estate owned by Bunch, at an execution sale, the land being at the time subject to two prior mortgages. It is well settled that where an equity of redemption is sold on execution, the purchaser takes the land charged with the payment of all prior encumbrances. The land becomes the primary fund for the payment of all encumbrances charged upon it prior to that upon which the sale is made. The amount bid will be presumed to be the price or value of the property, less the encumbrances. In such a case, where the purchaser obtains title to the land and subsequently pays off the pre-existing encumbrances, of which he had notice, he will not be permitted to keep them alive by having them assigned to himself. Having obtained the fund out of which the encumbrances are to be paid, he does nothing more than to discharge his own equitable obligation when he pays them off. *Atherton v. Toney*, 43 Ind. 211; *Shuler v. Hardin*, 25 Ind. 386; *Han-*

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cock v. Fleming, 103 Ind. 533; *Robins v. Swain*, 68 Ill. 197; *Weiner v. Heintz*, 17 Ill. 259; *Mines v. Moore*, 41 Ill. 273; *Johnson v. Zink*, 51 N. Y. 333; *Russell v. Allen*, 10 Paige, 249; *Cleveland v. Southard*, 25 Wis. 479; Jones Mort., section 736.

One who purchases property at an execution sale, is in the same position in respect to previous encumbrances as one who takes a quitclaim deed, or one who takes a deed expressly subject to encumbrances which constitute a charge upon the land. Such persons do not become personally liable to pay pre-existing encumbrances, but as in each case the purchaser is deemed to have deducted the amount of the prior encumbrances from the purchase-price, the land in his hands becomes the primary fund out of which the encumbrances are to be paid. When the purchaser pays them off, no matter by what method, they will be treated as extinguished, unless there is some equitable purpose to be subserved in keeping them alive. They will not be kept alive, however, when to do so would operate to the injury of another who has the right to have them treated as extinguished. Pomeroy Eq., section 1205; Jones Mort., section 737.

Grave having become the owner in fee, under his purchase at the execution sale, the land set off to him was, under the decrees which adjudged that his lands should be first sold, primarily charged with the payment of the prior mortgages. This was so, because presumptively he had deducted the amount of these mortgages out of the purchase-price when he bid in the land. When he purchased and took assignments of the mortgages, he simply paid the balance of the purchase-money, and the mortgages, with the debts which they secured, became merged in the fee which he had previously acquired. They had, therefore, no longer any existence. According to the rule that where two titles or interests in land unite in the same person, from the same source, the lesser estate or interest will merge in the greater and become extinct, unless there be some just and equitable intention to

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the contrary which will injure no one, the mortgages which were assigned to Grave became extinguished. *Birke v. Abbott*, 103 Ind. 1 (53 Am. R. 474); *Montgomery v. Vickery*, 110 Ind. 211.

There could be no just motive or equitable purpose which would authorize Grave to keep his own mortgages alive against his own land, and perform the novel feat of selling his land to pay debts which he had already paid, and for the payment of which his land was equitably charged. He knew when he purchased the land at the execution sale that, under the law of 1875, he acquired a right, and could obtain title as against the wife of the execution debtor to the undivided two-thirds of the land and no more. He was bound to know that as to the prior mortgages, executed by Mrs. Bunch and husband, for the latter's debt, she occupied a relation analogous to that of a surety. The two-thirds as to her was, therefore, charged with the payment of the whole debt, provided the land was of sufficient value. When he bid in the land and took the title he was bound to know that he took it charged with the payment of the existing encumbrances. When he paid them off he presumably paid just what, in legal effect, he agreed to pay for the land, viz., the amount of his bid and the prior encumbrances.

Payment of the prior mortgages by Grave was practically no more than the completion of all that was implied in his contract of purchase. That was the end of the transaction both as to Bunch, the original debtor, and his wife. True, she stood toward the mortgages, prior to their payment by Grave, in a relation analogous to that of a surety, but she owed no obligation to him. She was rather in a situation in which, for the protection of her own land, she was bound to see that Grave performed the obligation which primarily rested upon his land. He was, in effect, the principal, because he was in possession of the fund out of which the debts were to be paid, and which, it is admitted, was sufficient to pay the debts. In effect, he had in his hands the money with which

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to pay the encumbrances which rested upon the lands of both. When he paid them, he simply discharged his own primary obligation, out of a fund which he held for the benefit of himself and Mrs. Bunch. *Sanders v. Weelburg*, 107 Ind. 266.

Does the fact that Mrs. Bunch subsequently, under a misconception of her legal rights, obtained an order from the court requiring appellee Grave to proceed to sell his land, estop her from now asserting her rights as we have shown them to be? It can not be deemed that the order thus obtained has in any way enlarged the rights of Grave, or deprived the appellant of her equitable remedy.

She is not in the situation of a party who, having two inconsistent remedies, resorts to one, and is thereby concluded by her election. She had but one effectual legal or equitable remedy, and that was to have it adjudged that the decrees held by Grave were satisfied. A party who imagines he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one. *Kelsey v. Murphy*, 26 Pa. St. 78 (83); *Morris v. Rexford*, 18 N. Y. 552; *Lee v. Templeton*, 73 Ind. 315.

When Mrs. Bunch instituted her proceeding in the first instance, the appellee was wrongfully asserting his purpose to enforce the decrees, which were extinguished, to her prejudice. Her proceeding was a misadventure. It proved unavailing, because of the delay successfully interposed by her adversary. It has not, however, deprived her of the relief to which, upon the facts, she is equitably entitled. That proceeding has affected no right of the appellee. He could have ended the litigation long ago by giving over his purpose to perpetrate a wrong upon the appellant. The justice to which she was entitled from the beginning, and which has been too long delayed, ought not be wholly denied because she mistook her remedy in the first instance.

The complaint sets forth many facts that are wholly immaterial, but it also states facts which entitle the appellant to

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have the mortgages cancelled as to her land. It was therefore error to sustain the demurrer to her complaint, and for this error the judgment is reversed, with costs.

Filed June 22, 1887.

111	358
116	457
123	130
111	358
137	539
111	358
141	466

 No. 13,834.

BARTLEY v. THE STATE.

CRIMINAL LAW.—*Bill of Exceptions.—Agreement by Prosecuting Attorney Extending Time of Filing.*—An agreement by the prosecuting attorney extending the time for filing a bill of exceptions beyond the statutory limit of sixty days allowed by the court (section 1847, R. S. 1881), is without authority, and a bill thereafter filed is not properly in the record, and presents no question.

From the Noble Circuit Court.

L. W. Welker, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

NIBLACK, J.—Bartley, the appellant, was, at the March term, 1886, of the Noble Circuit Court, indicted for selling intoxicating liquor to one Albert Miller, a person under the age of twenty-one years.

At the succeeding December term, a jury found the appellant to be guilty as charged, and he was adjudged to pay a fine of twenty dollars and the costs of the prosecution.

It is complained only that the verdict was not sustained by sufficient evidence, and that the court erred in its instructions to the jury.

On the twenty-first judicial day of said December term, which was the 29th day of December, 1886, and the day on which judgment was rendered on the verdict, sixty days time was given to the appellant within which to prepare, and

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have signed, and to file his bill of exceptions containing the evidence, as well as the instructions given at the trial.

On the 23d day of February, 1887, the prosecuting attorney of the proper judicial circuit consented in writing that the time for preparing, signing and filing a bill of exceptions in the cause should be extended until the 15th day of April, 1887, and agreed to waive all irregularities which might result from such extension of time.

The bill of exceptions which we find copied into the record, and which purports to contain all the evidence and all the instructions given in the cause, is certified to us as having been filed on the 12th day of April, 1887. The attorney general makes the point that the prosecuting attorney had no power to extend the time for the filing of the bill of exceptions; that, consequently, his agreement to extend the time, as stated, was ineffectual to extend it, and that, for that reason, the bill of exceptions was not filed within the time limited by law, and has hence not been properly made a part of the record.

Section 1847, R. S. 1881, which constitutes a part of our present criminal code, is as follows: "All bills of exceptions, in a criminal prosecution, must be made out and presented to the judge at the time of the trial, or within such time thereafter as the judge may allow, not exceeding sixty days from the time judgment is rendered; and they must be signed by the judge and filed by the clerk."

The power of the court, therefore, to extend the time within which a bill of exceptions may be filed, after the close of the term, is, in a criminal cause, limited to sixty days after the judgment is rendered. A prosecuting attorney may, when further appearing in a criminal cause, withhold any objection to a bill of exceptions on account of its not having been filed in time, but he has no power to fix the time in the first instance, or to extend the time after it has been fixed by the court, and, consequently, can not enter into any agreement concerning such extension of time which

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would be binding upon any other person or tribunal. If he has the power to extend the time beyond the statutory limit of sixty days, he has, in that respect, an authority greater than is conferred upon the court, and no such claim of authority on his part either has been, or will be, asserted. The rule to be observed in making out and filing bills of exceptions in criminal causes, is less elastic, and has been, and still is not so liberal as that prescribed in civil cases. *Buskirk Pr.*, 147, 420; *R. S.* 1881, section 629.

It follows that the bill of exceptions in this case was not filed in time, and that, in consequence, no question is presented in this court either upon the evidence or the instructions.

The judgment is affirmed, with costs.

Filed June 23, 1887.

No. 12,459.

WHETTON ET AL. v. CLAYTON ET AL.

HIGHWAY.—*Proceeding to Vacate.*—*Evidence.*—In a proceeding to vacate a public highway it is not error to exclude testimony to the effect that certain individuals had offered to construct a foot-bridge over a stream which crossed such highway.

SAME.—*Best Evidence.*—In such proceeding an order of vacation theretofore made by the board of commissioners can not be proved by parol, in the absence of any reason shown for the attempted resort to secondary evidence.

SUPREME COURT.—*Practice.*—*Instructions.*—*Motion for New Trial.*—*Record.*—Instructions can not be made part of the record by copying them into the motion for a new trial.

From the Elkhart Circuit Court.

A. S. Zook, D. Zook and W. H. H. Dennis, for appellants.

J. H. Baker, F. E. Baker and S. J. North, for appellees.

ELLIOTT, J.—This is an appeal from an order refusing to vacate a public way.

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It is contended by the appellants that the trial court erred in refusing to permit them to prove that private persons had offered to construct a foot-bridge across a stream which crosses the highway. There was no error in this. A highway is a very different thing from a mere private way built or maintained by private individuals. The public and individuals have very different rights respecting it from those which they have in a private way. It is not proper to prove what individuals will do, where the question is whether a public way shall be laid out, or whether one already opened shall be maintained.

There was no error in refusing to permit the appellants to prove by parol when an order of vacation was made. That could only be proved by the record. There may be cases where parol evidence is admissible, but this is not one of them, for there was no reason shown, or attempted to be shown, justifying a resort to secondary evidence.

We think that there were such pleadings as entitled the appellees to have the evidence given by them considered by the jury, and that there was no error in overruling the motion to exclude it.

Instructions can not be made part of the record by copying them into the motion for a new trial.

Judgment affirmed.

Filed June 28, 1887.

No. 12,735.

GROSCOP v. RAINIER ET AL.

INTOXICATING LIQUOR.—*Remonstrance.*—*Immorality.*—Immorality on the part of the applicant, which may be made the basis of a remonstrance against the granting of a license to retail intoxicating liquors, under the act of March 17th, 1875, is not limited to such immorality as is specified in that act.

111	361
114	270
116	146
111	361
125	75
111	361
139	213
111	361
141	692

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SAME.—Common Gambler.—Frequenting places where gambling is permitted is, under section 2085, R. S. 1881, a public offence, and is such an immorality as unfits an applicant to be intrusted with the sale of intoxicating liquors.

SAME.—Qualification of Remonstrants.—Waiver of Objections to.—Estoppel.—

Where the board of commissioners, without objection on the part of the applicant, entertains and acts upon a remonstrance, and hears and determines the questions thereby presented, and on appeal the circuit court does likewise, also without objection, all objections to the remonstrants are waived by the applicant, and the latter is estopped to deny that they are legal voters of the township.

INTERROGATORIES TO JURY.—Withdrawal.—Practice.—To constitute available error in permitting a party to withdraw from the jury, over the objection of the adverse party, interrogatories propounded by him, it must be shown that such interrogatories were pertinent and material.

From the DeKalb Circuit Court.

P. V. Hoffman and *D. D. Moody*, for appellant.

Howk, J.—At the March term, 1885, of the board of commissioners of DeKalb county, appellant Groscop presented his application to such board for license to sell intoxicating liquors in less quantities than a quart at a time, at his place of business, particularly described, in the town of Auburn, in such county, to be drank upon the premises where sold. At the same term appellees Rainier and others filed before such board a written remonstrance against such application. Upon a trial then had, the county board granted appellant's application, and ordered that such license be issued to him for the term of one year. From this order of the county board the remonstrants appealed to the court below. There the cause was tried by a jury, and a general verdict was returned for the remonstrants. With their general verdict the jury also returned into court their special findings on particular questions of fact, submitted to them by the appellant under the direction of the court. Over appellant's motions for judgment in his favor on the special findings of the jury, notwithstanding their general verdict, and for a new trial, the court rendered judgment for appellees, remon-

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strants below, upon and in accordance with the general verdict.

Errors are assigned here by appellant which call in question (1) the overruling of his motion for judgment in his favor on the special findings of the jury, notwithstanding their general verdict, and (2) the overruling of his motion for a new trial.

The facts found specially by the jury, in answer to the questions submitted to them, were substantially as follows: William Groscop, applicant herein, is a male inhabitant of Union township, DeKalb county, Indiana, and is over twenty-one years of age. Prior to his application for license William Groscop did not follow gambling as an occupation or livelihood, nor did he, prior to such application, keep a gambling house. Such applicant was not a person in the habit of becoming intoxicated. Such applicant, by frequenting places of gambling, is an immoral man, and such immorality unfits him for the sale of intoxicating liquors, under the laws of this State. Such applicant is not a fit person to be trusted with the sale of intoxicating liquors, under the laws of this State.

In the last sentence of section 5314, R. S. 1881, in force since March 17th, 1875, it is provided as follows: "And it shall be the privilege of any voter of said township to remonstrate, in writing, against the granting of such license to any applicant, on account of immorality or other unfitness, as is specified in this act." It is vigorously insisted by appellant's counsel that where, as in this case, the remonstrance against an application for license is "on account of immorality" of the applicant, it must be shown that the "immorality" is such "as is specified in this act" of March 17th, 1875, "to regulate and license the sale of spiritous, vinous and malt and other intoxicating liquors," etc., or it will not defeat the application nor deprive the applicant of his license. In other words, counsel claim that the phrase, "as is specified in this act," in the sentence above quoted of the statute,

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qualifies and limits the meaning of the word "immorality," there found, to such immorality only as is specified in the aforesaid act of March 17th, 1875.

In the case in hand the jury found specially, in effect, that appellant was an immoral man, *only* in the respect of his "frequenting places of gambling." It was clearly an immorality on the part of appellant to frequent places of gambling; for, under section 2085, R. S. 1881, whoever "frequents any place where gambling is permitted," is pronounced a "common gambler," and, upon conviction thereof, is liable to fine and imprisonment. "Frequenting places of gambling," however, is not an immorality "specified in this act" of March 17th, 1875, and, therefore, it is earnestly contended on behalf of appellant that this immorality ought not, under the statute, to have defeated his application herein for license.

Counsel say: "We think the Legislature meant that any deliberate violation of the liquor law would be immorality, 'as is specified in this act,' and ought *per se* to disqualify the applicant. When the Legislature enacted the statute it saw fit to say that a person in the habit of becoming intoxicated should not sell, and also declared that the licensee should not sell to minors, drunkards, nor a drunken person, nor on Sunday, election day, or holidays, nor from 11 o'clock P. M. to 5 o'clock A. M.; that he should not adulterate liquor, and should keep an orderly and peaceable house."

It is claimed by appellant's counsel that a deliberate violator of the liquor law in any particular is guilty of immorality, as "specified in this act," and ought not to be intrusted with a license to sell intoxicating liquor. We agree with counsel that a deliberate violator of the provisions of the liquor law ought not to be entrusted with a license to sell intoxicating liquors, not so much on the score of immorality, however, as because such an applicant is not, in the language of the first proviso in section 5315, R. S. 1881, "a fit person to be intrusted with the sale of intoxicating liquor."

In *Calder v. Sheppard*, 61 Ind. 219, it was, in effect, held

by this court that the "habit of becoming intoxicated," or habitual drunkenness, was the only kind of immorality specified in the aforesaid act, and that such habit was, therefore, the only species of immorality which could be made the foundation of a remonstrance. It can hardly be said, we think, that the "habit of becoming intoxicated" is specified in the act as an immorality, but it is specified rather as an "unfitness," which would wholly prevent an applicant, who was in all other respects a "fit person," from receiving a license to sell intoxicating liquors. Thus, the first proviso of section 5315, *supra*, reads as follows: "*Provided*, Said applicant be a fit person to be intrusted with the sale of intoxicating liquor, and if he be not in the habit of becoming intoxicated; but in no case shall a license be granted to a person in the habit of becoming intoxicated." Fairly interpreted, this proviso means that in no event shall an applicant for license, who is in the habit of becoming intoxicated, be regarded as "a fit person to be intrusted with the sale of intoxicating liquor."

We are of opinion that it is a mistaken construction of the last sentence of section 5314, *supra*, heretofore quoted in this opinion, to say that the concluding phrase therein, "as is specified in this act," qualifies or limits the meaning of the word "immorality," found in that sentence, to such immorality only as is specified in the act referred to. Such qualification or limitation of the meaning of the word "immorality," as found in such sentence, is not required by, but, we think, is opposed to the proper grammatical construction of the language used. The phrase, "as is specified in this act," certainly qualifies and limits the word "unfitness," which it immediately follows; and "unfitness" is not coupled with, but, by a disjunctive conjunction, is separated from the word "immorality" in the sentence quoted. If it had been intended to qualify and limit both words, we may well suppose that they would have been united by a copulative conjunction, followed by the phrase, "as are specified in this act."

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In *Grummon v. Holmes*, 76 Ind. 585, it was held by this court that other kinds of immorality than the habit of becoming intoxicated may be made the ground of a remonstrance against an applicant for license to sell intoxicating liquors, under the provisions of section 5314, *supra*, when properly stated in such remonstrance; and the case of *Calder v. Sheppard*, *supra*, in so far as it declared a contrary doctrine, was overruled by the court. In the case under consideration it is very clear, we think, that the trial court did not err in overruling appellant's motion for judgment in his favor on the special findings of the jury, notwithstanding their general verdict.

Under the alleged error of the court in overruling appellant's motion for a new trial, his counsel first insist that the general verdict of the jury was not sustained by sufficient evidence. As we have seen, it is provided in section 5314, *supra*, that "it shall be the privilege of any voter of the township to remonstrate," etc. The appellees commenced their remonstrance herein, filed before the board of commissioners of DeKalb county, as follows: "We, the undersigned, voters of Union township, DeKalb county, State of Indiana, remonstrate," etc.

Appellant's counsel make the point that no evidence was given on the trial to show that the remonstrants were such voters. Counsel say: "Without the averment that the remonstrants were voters, their remonstrance would not have been good, and this being a material averment it was necessary to prove it." We are of opinion, however, that this question as to whether or not the appellees were such persons as were authorized, under the statute, to remonstrate against appellant's application for license, was a preliminary question, to be determined *in limine* by the county board. Where it appears, as in the case now before us, that the board of commissioners, without objection on the part of the applicant, entertained and acted upon the remonstrance filed, and heard and determined the questions thereby presented, and that, on

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appeal, the circuit court of the county did the like, under like circumstances, it must be held, we think, that such applicant has waived all objections to the appellees as remonstrants, and is estopped to deny that they were, as they claimed to be, legal voters of the proper township. This is in harmony with numerous decisions of this court, to the effect that, on an appeal from the board of commissioners to the circuit court of the county, nothing can be tried except what appears to have been in issue before such board. *Green v. Elliott*, 86 Ind. 53; *Forsythe v. Kreuter*, 100 Ind. 27; *Osborn v. Sutton*, 108 Ind. 443.

Appellant's counsel also insist that the trial court erred in refusing to modify its oral instructions, when the jury were recalled into court for further instructions. In their remonstrance appellees had charged appellant with immorality, in that he was a common gambler, that he was, and for the six months then last past, had been the proprietor and keeper of a building and room to be used and occupied for gaming, and knowingly permitted the same to be used and occupied for gaming, and that he was in the habit of frequenting places where gaming was permitted to be carried on. When the jury were recalled for further instructions, the trial court directed their attention to the specific charges of immorality in the remonstrance, and correctly instructed them that they were not to consider the immorality of the appellant in any other respect or particular except those specified in the remonstrance. No complaint is made here of this oral instruction as given, but only of the court's refusal to modify the same, as follows:

“That, even though the jury might find that the applicant was guilty of being a common gambler, or of having kept a gambling house, still, such facts would not, of themselves, be an absolute disqualification of the applicant for a license; but it was a question for the jury to say whether or not such violations of law, if they existed, were sufficient to disqualify the applicant for a license.”

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We are clearly of the opinion that the court committed no error in refusing to give the jury this modification, as requested by appellant, of its oral instruction. Appellees charged the applicant with immorality, in that he frequented places where gaming was permitted to be carried on; and the jury found specially that "such applicant, by frequenting places of gambling, is an immoral man." From the fact thus found, it is not a question for the jury to say, but the law concludes inevitably that such immorality unfits the applicant to be intrusted with the sale of intoxicating liquor.

We have already said, and we say again, "It was clearly an immorality on the part of appellant to frequent places of gambling; for, under section 2085, R. S. 1881, whoever 'frequents any place where gambling is permitted,' is pronounced a 'common gambler,' and, upon conviction thereof, is liable to fine and imprisonment." It is a public offence to be a "common gambler," and to be guilty of a public offence is an immorality within the meaning of the word, as used in the law regulating and licensing the sale of intoxicating liquors.

Finally, appellant's counsel claim that the trial court erred in permitting appellees to withdraw certain interrogatories propounded by them to the jury trying the cause, "over the objections and exceptions of the applicant." What were the grounds of appellant's objections to the withdrawal of these interrogatories from the jury the record of this cause fails to disclose.

In *Summers v. Greathouse*, 87 Ind. 205, it was held, substantially, that it would be error to withdraw from the jury pertinent and material interrogatories, which have been submitted to them at the request of the parties. In the case in hand the interrogatories, which the trial court permitted appellees to withdraw from the jury, are not in the record now before us, and we do not and can not know from the record that such interrogatories were pertinent and material; indeed, as all reasonable presumptions must be indulged here

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served the full term of four years, and his successor has been duly elected and qualified, he is estopped from denying that his term of office has expired.

CONSTITUTIONAL LAW.—*Repeal of Old Constitution by Inconsistent Provisions of New.—Statute.—Repeal by Implication.*—The adoption of a new Constitution repeals and supersedes all the provisions of the older Constitution, not continued in force by the new instrument; and the same rule applies to amendments of an existing Constitution, which are inconsistent with the original text of the instrument amended; also to statutory enactments which are inconsistent with later constitutional provisions embracing the same subject-matter.

From the Allen Circuit Court.

J. Morris, J. M. Barrett, R. C. Bell and S. B. Morris, for appellant.

W. G. Colerick, for appellee.

NIBLACK, J.—This proceeding is based upon an information in the nature of a *quo warranto*, against Adolph Louis Griebel, in the name of the State, and on the relation of John B. Niezer.

The information gives the court to understand and to be informed that on the 7th day of November, 1882, at a general election held on that day, in the county of Allen, in this State, the said Griebel was duly elected auditor of said county of Allen, and that after having duly qualified, he, on the 17th day of that month, entered upon the duties of the office to which he had been so elected; that, under the Constitution and laws of this State, the said Griebel was entitled to hold said office for and during the period of four years from the 13th day of said month of November, 1882, and until his successor should be elected and qualified; that at the general election held in said county of Allen, on the 2d day of November, 1886, the relator Niezer was lawfully elected auditor of that county as the successor of the said Griebel; that the said relator was, at the time of his said election, and still is, eligible to the office of auditor to which he was so elected; that, on the 6th day of said month of November, 1886, a commission was duly issued to the relator by the Governor

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263 ; *People v. Forquer*, Breese (Ill.) 104 ; *St. Louis County Court v. Sparks*, 10 Mo. 117 ; *Ex parte Strong*, 20 Pickering, 484 ; *Sudbury v. Stearns*, 21 Pickering, 148 ; *Lindsey v. Attorney General*, 33 Miss. 508 ; *People v. Tibbels*, 4 Cowen, 382, and note ; *Gass v. State, ex rel.*, 34 Ind. 425.

There is, consequently, no serious objection to the substantial sufficiency of the information.

The reply raises the question as to when the term of a county auditor either begins, or may begin, under the present Constitution of this State, and certain statutes having reference to that subject.

Before the adoption of our present Constitution the office of county auditor was only a statutory office. Section 44 of the 2d article of chapter 7 of the Revised Statutes of 1843, provided that "The county auditor shall hold his office for the term of five years from the first Monday in March next succeeding his election, and until his successor is chosen and qualified." R. S. 1843, 188.

Section 49, of the same article, further provided that when a vacancy should happen in the office of county auditor, the board of commissioners of the proper county should appoint some suitable person to fill the vacancy, who was to hold the office until the next general election, and until his successor was elected and qualified.

Under these two sections, the term of a county auditor, who succeeded a full term, and a regular succession of terms, commenced on the first Monday in March next after his election ; but where a person was elected to succeed one who held the office by appointment to fill a vacancy, his term commenced as soon as he was commissioned and qualified, and was ready to enter upon the duties of the office. This was usually within a few weeks after the election ; which was then held annually in August, but was not, in the nature of things, uniform as to time. After the lapse of a few years, therefore, the term of the office of county auditor, in many of the counties of this State, was, by reason of intervening

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vacancies, made to begin some time soon after the August election, at which the office was filled, instead of on the first Monday in March next succeeding, and this condition of things existed when our present State Constitution was adopted, which first gave that office a constitutional term, as well as a constitutional *status*.

The second section of article 6 of the Constitution ordains that "There shall be elected, in each county, by the voters thereof, at the time of holding general elections, a clerk of the circuit court, auditor, recorder, treasurer, sheriff, coroner, and surveyor. The clerk, auditor, and recorder shall continue in office four years; and no person shall be eligible to the office of clerk, recorder, or auditor more than eight years in any period of twelve years," the rest of the section having reference only to the terms of treasurer, sheriff, coroner and surveyor.

The third section of article 15 of the Constitution further ordains that "Whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer, other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified."

The tenth clause of the schedule annexed to the Constitution, for the purpose of facilitating the reorganization of the State government under that instrument, provided that "Every person elected by popular vote, and now in any office which is continued by this Constitution; and every person who shall be so elected to any such office before the taking effect of this Constitution (except as in this Constitution otherwise provided), shall continue in office until the term for which such person has been, or may be, elected, shall expire: *Provided*, That no such person shall continue in office after the taking effect of this Constitution for a longer period than the term of such office in this Constitution prescribed."

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Under the operation of these constitutional provisions there has never been, since they took effect, any uniformity either as to the time when the term of county auditor begins, or as to when it expires, in the several counties of this State, and this want of uniformity has been greatly increased by the respective changes of the times of holding our general elections which have ensued. The act of May 31st, 1852, R. S. 1881, section 5893, nevertheless declared that a county auditor's term of office should thereafter begin on the first Monday in March next succeeding his election, and the act of March 3d, 1855, Acts of 1855, p. 52, prescribed, amongst other things, that the terms of county auditors should "commence on the first Monday of the month of November, immediately following the general October elections," and fixed that day as the time at which the terms of persons thereafter elected to the office of county auditor should expire.

In the case of *Howard v. State*, 10 Ind. 99, it was held that the Legislature has no power either to abridge or extend the term of an officer where his term is prescribed by the Constitution, and that, hence, the act of 1855 was in conflict with the second section of article 6 of the Constitution, hereinabove set out, and, for that reason, void.

In the more recent case of *Douglass v. State*, 31 Ind. 429, the doctrine that the Legislature can neither abridge nor extend the term of an officer which is fixed by the Constitution was reaffirmed, and the invalidity of the act of 1855, as applicable to cases like that of *Howard v. State*, *supra*, was again recognized, but the conclusion was then also reached that the act in question might be, and probably was, operative in some cases in which the succession of terms had been broken by intervening vacancies, and that, at all events, it had validity enough to repeal, by implication, so much of the act of May 31st, 1852, as declared that the terms of county auditors should commence on the first Monday in March next succeeding the times of their election.

To the conclusion at which this court then arrived, and

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as thus stated, we still adhere. We have also reached the further conclusion that the act of 1855 was, in effect, abrogated and annulled by the amendment of the Constitution which changed the time of holding our general elections from October to November. The adoption of a new Constitution repeals and supersedes all the provisions of the older Constitution not continued in force by the new instrument. The same rule applies to amendments of an existing Constitution which are inconsistent with the original text of the instrument amended; also to statutory enactments which are inconsistent with later constitutional provisions embracing the same subject-matter. *Pierce v. Delamater*, 1 Comstock, 17; Potter's Dwarris Statutes, 113; Sedgwick Statutory Law, 107.

This act of 1855 had special reference only to the terms pertaining to certain offices which had then to be filled at an October election, and when the October election was abolished there was no longer any election to which the act was, in any proper sense, applicable. The case presented, therefore, is one of the implied repeal of a statute by the adoption of an inconsistent constitutional amendment. There is, consequently, no statute now in force prescribing when the term of a county auditor shall be held to begin. On that subject we are remitted to the provisions of the Constitution and of the schedule annexed, to which we have already referred.

Where there has been an unbroken succession of terms from the adoption of the Constitution until the present time, and no general acquiescence in a different day or time, the commencement of a county auditor's term dates back to, and is governed by, the time at which the term of the auditor, who was in office when the Constitution took effect, expired. But where the regular succession of terms has been broken either by intervening vacancies or other incidental causes, the term of a newly elected auditor begins when the regular four years term, or the provisional term, as the case may be, of his predecessor expires, and this results independently of any statute which may have been, or may hereafter be, en-

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acted on the subject. Whenever a county auditor has, in pursuance of an election to the office, served the full term of four years, and his successor has been duly elected and qualified, he is estopped from denying that his term of office has expired.

As has been shown, it is only when his successor has not been chosen and qualified that a county auditor is authorized to continue in office beyond his term of four years. See *Opinions of Attorney General Hord*, vol. 1, 113; *State v. Thoman*, 10 Kans. 191; *Fant v. Gibbs*, 54 Miss. 396; *People v. Bull*, 46 N. Y. 57; *State v. Howe*, 25 Ohio St. 588; *State v. Brewster*, 44 Ohio St. 589; *State, ex rel., v. Chapin*, 110 Ind. 272.

There is nothing averred in this case from which it can be inferred what the succession of terms in the office of auditor of Allen county has been, but the reply alleges that Argo, soon after his election in 1878, took possession of the office and held it for the full term of four years; that, after his term had expired, that is to say, on the 17th day of November, 1882, Griebel, as his duly elected and qualified successor, came into possession of the office, and served as such successor for the ensuing term of four years. The reasonable, and hence proper, inference from these allegations is, that Griebel was lawfully entitled to enter upon the duties of the office when he took possession of it, and that he had served out his full constitutional term of four years when Niezer demanded the office of him as stated.

The facts as alleged in the reply, when taken in connection with those set forth in the information and the answer, are sufficient to show that, as against Niezer, Griebel's term had expired when the demand was made. Consequently the demurrer to the reply was rightly overruled.

The judgment is affirmed, with costs.

ZOLLARS, C. J., took no part in the decision of this cause.

Filed June 30, 1887.

McKee v. The State.

No. 13,786.

MCKEE v. THE STATE.

CRIMINAL LAW.—Conspiracy to Defraud.—Indictment.—Naming Parties to be Defrauded.—It is not necessary to the sufficiency of an indictment charging a conspiracy to cheat and defraud "divers citizens of Randolph county" and the "public generally," by certain false and fraudulent representations, that the names of the persons against whom the conspiracy was directed should be set out.

SAME.—Character of Pretences.—Question for Jury.—In such a case, whether the alleged pretences were of such a character as to impose upon citizens of the community, as communities are actually constituted, is a question of fact for the jury to determine.

SAME.—Protection of Weak and Credulous.—The purpose of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves.

SAME.—Renewal of Conspiracy.—After the joint design is once fairly established, every act done in pursuance of the original purpose, whether by one or more of the conspirators, or their agent, is a renewal of the original conspiracy.

SAME.—Agent of Conspirators.—Declarations of.—Evidence.—One employed as agent by conspirators, after their criminal undertaking is on foot; to aid in the prosecution of their designs, may testify to false representations made by him and some of his associates while carrying forward the business of the undertaking, although made in the absence of the person on trial.

SAME.—Employment of Agent to Commit Crime.—Liability of Principal.—One who employs an agent to assist in the execution of a criminal act is as guilty of the acts of the person employed as if he himself had performed them.

SAME.—Formal Agreement Not Essential to Formation of Conspiracy.—It is not essential to the formation of a conspiracy that there should be any formal agreement between the parties to do the acts charged, but it is sufficient if the minds of the parties understandingly meet, so as to bring about an intelligent and deliberate agreement to do the acts, although not manifested by any formal words.

From the Randolph Circuit Court.

T. Shockney, R. S. Gregory and A. C. Silverburg, for appellant.

L. T. Michener, Attorney General, S. A. Canada, Prosecuting Attorney, J. H. Gillett, W. A. Thompson, A. O. Marsh,

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121	270
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147	473
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153	86
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154	179
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157	102
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159	600
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164	176
164	237
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169	492
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J. W. Thompson, B. F. Marsh, E. L. Watson, J. S. Engle and J. E. Watson, for the State.

MITCHELL, J.—At the November term, 1886, of the Randolph Circuit Court, an indictment in three counts was returned by the grand jury of Randolph county, in which the appellant and three others were jointly charged, under section 2139, R. S. 1881, with having theretofore, designedly, etc., with intent, etc., unlawfully, feloniously, etc., conspired, etc., with each other, to obtain the signatures of divers citizens of the county of Randolph, and the public generally, to certain promissory notes, and to procure said citizens and the public generally to execute and affix their signatures to certain written instruments, and promises to pay money, etc., by means of certain representations which are set out, and which they agreed to make, and induce divers persons to rely upon, all of which representations, etc., so agreed to be made, it is charged, were false and fraudulent.

The second count of the indictment was quashed, after which, upon trial, the appellant was found guilty as charged in the first count, and his punishment fixed at two years imprisonment in the State's prison.

It is now contended that the count upon which the conviction was had is fatally defective, in that it fails to give the name or names of the persons to be defrauded, and fails to give any reason for the omission of such names.

The indictment charges a conspiracy to cheat and defraud "divers citizens of Randolph county," and the "public generally," by means of certain false representations and fraudulent devices, which were to be employed, and the question presented is, whether in a charge of conspiracy it is necessary to aver the names of the persons against whom the conspiracy is directed or who are thereby to be defrauded.

The authorities abundantly settle the proposition that an indictment is not objectionable which charges that the object of the conspiracy is to defraud many persons, not capable of

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being resolved into individuals, or the public generally, instead of certain named individuals. 2 Bishop Crim. Law, section 209; 2 Whart. Crim. Law, section 1396.

In *Rex v. De Berenger*, 3 M. & S. 67, the charge was a conspiracy to defraud such subjects of the King as should make purchases in the public funds, when the price should be artificially advanced.

In *Clary v. Commonwealth*, 4 Pa. St. 210, an indictment which charged a conspiracy which had for its purpose the circulation of certain false and forged bills, with the intent to cheat and defraud "the citizens of this commonwealth and others," was held good. So, also, in *Commonwealth v. Judd*, 2 Mass. 329, a conspiracy to manufacture spurious indigo, and sell the same at public auction, with intent to cheat and defraud such persons as should become purchasers, was held sufficient. See, also, *People v. Arnold*, 46 Mich. 268; *Collins v. Commonwealth*, 3 S. & R. 220; *Reg. v. Peck*, 9 A. & E. 686.

Undoubtedly, if the nature of the conspiracy is such as to define the particular persons against whom it is directed, or if from the commission of overt acts the conspirators have actually accomplished their fraudulent purpose, so that the names of the victims are ascertainable by the pleader, the better method would be to allege the names of those actually defrauded. The necessities of the case may often, however, require that the general form of pleading adopted in the indictment before us should be sustained. The indictment was not bad for the reasons urged against it.

The false and fraudulent representations set out in the indictment, by which the alleged conspirators were to cheat and defraud divers citizens and the public generally, consisted in representing, among other things, that "The Indiana Seed Association" had been duly incorporated, and that the purpose of the association was the cultivation of certain kinds of wheat and Bohemian oats, and that the association was solvent, and had on deposit with the secretary of the

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State of Indiana one hundred and fifty thousand dollars in cash, and a bond for a like sum, as an indemnity for all those who would purchase its merchandise. Other representations, such as that the association had the right to use the seal of the State on its contracts and bonds, that the State had guaranteed its obligations, and that the association would obligate itself to take double the number of bushels of wheat or oats purchased from it by any of its customers, and sell the same for ten dollars per bushel for oats and fifteen dollars per bushel for wheat, were also set out as part of the fraudulent scheme agreed upon in order to procure the signatures of divers citizens to promissory notes.

It is said that the representations were so unreasonable and of such a character, as that no person exercising reasonable caution would be warranted in believing them.

Whatever force this argument might have if addressed to a jury, upon the facts as they are alleged, it can hardly be allowed to prevail as a question of law. The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves. *Smith v. State*, 17 Am. L. Reg. 525; 16 Am. L. Reg. 321 (325).

Whether the alleged pretences were of such a character as to impose upon citizens of the community, as communities are actually constituted, was a question of fact to be left to the determination of the jury. *Miller v. State*, 79 Ind. 198; 2 Whart. Crim. Law, sections 1186-7-8; 2 Bishop Crim. Law, sections 433, 434.

It could serve no useful purpose to set out in detail any part of the evidence. The concession may be made that it shows that the appellant had for a quarter of a century or more stood in fair repute among his neighbors, and that, possibly, he inadvertently permitted himself to be made the instrument, more effectually to execute the designs, of professional swindlers, who have escaped their deserts. It must

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also be remembered, however, that the appellant was a man ripe in years and in experience, having been a merchant and trustee of his township. It must have seemed incredible to the jury that, with his age and experience, he did not comprehend that the whole business was a fraud from beginning to end. At all events, a jury of his own selection, who heard all the evidence, after careful direction by a competent court have pronounced him guilty. As there was competent evidence which satisfied the jury we can not disturb their verdict on the weight of the evidence.

It appeared in evidence that one William D. Bailey was employed as agent of the association of which the appellant was a member. Bailey was employed after the association had been organized, and during the progress of its business, for the purpose of aiding in the prosecution of its designs. He was permitted, over objection, to testify to certain alleged false representations made by him, and other members of the association, while carrying forward its business with farmers and others to whom sales of Bohemian oats were negotiated. Others, to whom these representations were made, were permitted, in like manner, to testify concerning the character of the representations. It is insisted that the court erred in admitting this testimony, because it appeared that the declarations of Bailey were made subsequent to the conspiracy charged in the indictment, and in the absence of the appellant.

The relation of Bailey to the accused, and to those engaged with him in the alleged conspiracy, having been satisfactorily established, his acts and declarations in furtherance of the common design, while the conspiracy continued, were admissible against his associates, even though such acts and declarations were done and made in their absence. *Walton v. State*, 88 Ind. 9; *Williams v. State*, 47 Ind. 568; Moore Crim. Law, sec. 348.

After the joint design was once fairly established, every act done in pursuance of the original purpose, whether by one

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or more of the conspirators, or by their agent, was a renewal of the original conspiracy.

When a common purpose to prosecute an unlawful scheme has been shown, the overt acts or declarations of any one, or all concerned, while engaged in the execution of such purpose, are admissible, as illustrating the design and establishing the character of the original confederacy.

One who employs an agent to assist in the execution of a criminal act, is equally guilty of the acts of the person employed, as if he had himself performed them. 1 Whart. Crim. Law, sec. 247.

The person so employed simply becomes a confederate in crime, and this is so whether he be employed at the beginning of the conspiracy or while it is in progress. The admissibility of the testimony of Bailey was in no wise affected by the fact that he was employed after the association was organized, or that the acts done and declarations made by him were done and made after its business was under way.

In one of its charges the court told the jury, in substance, that it was not essential to the formation of a conspiracy that there should have been any formal agreement between the parties to do the acts charged; that it would be sufficient if the minds of the parties understandingly met, so as to bring about an intelligent and deliberate agreement to do the acts and commit the crimes charged, although such agreement was not manifested by any formal words.

The law was well and accurately stated in the foregoing charge, and the objections urged against it can not prevail.

Concurrence of sentiment, and co-operative conduct in an unlawful and criminal enterprise, and not formality of speech, are the essential ingredients of criminal conspiracy. *Archer v. State*, 106 Ind. 426 (432); 2 Whart. Crim. Law, sec. 1398.

We have considered the other instructions, concerning which some merely suggestive criticisms are made. They were not erroneous.

We have now examined all the alleged errors discussed in

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the briefs. Our conclusion is that the appellant had a fair trial, without any intervening error, before an impartial jury.

The judgment is affirmed, with costs.

Filed June 24, 1887.

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No. 12,632.

LYON ET AL. v. DAVIS ET AL.

BILL OF EXCEPTIONS.—*Statement that Evidence was "Offered" not Equivalent of "Introduced."*—A statement in a bill of exceptions that the parties "offered the following evidence" is not the equivalent of a statement that the evidence was introduced or admitted.

SAME.—*Must Show that it Contains all Evidence Adduced.*—A bill of exceptions which shows on its face that it does not include all the evidence adduced and the agreements of the parties entered into at the trial, is substantially defective.

SAME.—*Long-Hand Manuscript.*—*Certificate of Judge.*—It is for the judge, and for him alone, to certify that the evidence set out in the long-hand manuscript is all the evidence given in the cause.

INSTRUCTIONS TO JURY.—*Applicability to Evidence.*—*Practice.*—Where the evidence is not properly in the record, no available question can be predicated upon the giving or the refusal to give instructions, the correctness of which depends upon the facts.

From the Vigo Superior Court.

C. F. McNutt, J. G. McNutt and P. H. Blue, for appellants.

S. C. Davis, S. B. Davis, J. T. Hays and H. J. Hays, for appellees.

NIBLACK, J.—This was an action by John Davis and Benjamin Davis, partners, doing business under the firm name of John Davis & Sons, against John B. Lyon and Thomas B. Rice, partners in business in the name of Lyon & Co., upon an account for goods, wares and merchandise alleged to have been sold and delivered to the defendants.

The action was commenced in the Sullivan Circuit Court,

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but the venue was changed to the superior court of Vigo county, where the cause was tried.

The plaintiffs obtained a verdict, and, over a motion for a new trial, a judgment for \$438.35.

The only claim made for a reversal of the judgment is based upon the alleged insufficiency of the evidence to sustain the verdict, and the respective giving, and refusal to give, certain instructions.

The point is made that the bill of exceptions, purporting to contain the evidence, is not only informal, but is substantially defective, and that, for that reason, the evidence is, in legal contemplation, not in the record.

There is copied into the record what is assumed to be an original long-hand manuscript of the evidence as taken at the trial and as written out by an official reporter. This manuscript, after giving the title of the cause, proceeds: "Be it remembered that upon the trial of this cause the plaintiffs, to sustain the issue on their part, *offered* the following evidence."

Then follows the examination and cross-examination of a considerable number of witnesses, interspersed with documentary evidence, connected with which several blank spaces remain unfilled.

After the plaintiffs seemingly conclude, the manuscript continues: "The defendants, to sustain the issue upon their part, *offered* the following evidence," proceeding thence to give the examination and cross-examination of several witnesses, and to set out certain documentary evidence. The manuscript closes with the statement made by the official reporter, "And this was all the evidence given in the cause." This is followed by a certificate from the official reporter that the manuscript contains a true and complete report of the evidence in the cause as taken in short-hand and afterwards written out by her.

Then comes the certificate of the judge who tried the cause,

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in these words: "And the defendants now, within the term and the time allowed, present this, their bill of exceptions, which is now signed and sealed by the court, and ordered to be made a part of the record. Witness my hand and seal this, the 24th day of November, 1884."

The bill of exceptions, to which the certificate of the judge was so attached, is informal: *First*. Because the caption and introductory part were made by the official reporter, and entered upon the long-hand manuscript instead of comprising a portion of the judge's statement independently of, and prefatory to, the inclusion of such long-hand manuscript. *Secondly*. Because the statement in the long-hand manuscript that the parties respectively "offered the following evidence," is not the equivalent of an assertion that the evidence was either introduced or admitted. *Fellenzer v. Van Valzah*, 95 Ind. 128; *Garrison v. State*, 110 Ind. 145; *Central Union Telephone Co. v. State, ex rel.*, 110 Ind. 203.

The bill of exceptions is also substantially defective: *First*. Because it shows on its face that it does not include all the evidence adduced, and the agreements of the parties entered into, at the trial. *Collins v. Collins*, 100 Ind. 266; *Thames Loan, etc., Co. v. Beville*, 100 Ind. 309; *Beatty v. O'Connor*, 106 Ind. 81.

Secondly. Because the judge did not certify that the evidence set out in the long-hand manuscript contains all the evidence given in the cause. *Marshall v. State, ex rel.*, 107 Ind. 173; *Wagoner v. Wilson*, 108 Ind. 210.

It is the certificate or signature of the judge which gives verity to the matters contained in a bill of exceptions, and it is upon him, and upon him alone, that this court must rely for the assurance that the bill of exceptions contains all the evidence given at the trial. It follows that the evidence in this case is not properly before us, and that we are, hence, unable to consider any question arising out of or resting upon the evidence.

The principal objection urged to certain instructions which

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were given, is that they were not applicable to the evidence, and, in support of the instructions which the court refused to give, it is claimed that they were especially appropriate to the facts disclosed by the evidence. In the absence of the evidence, therefore, no available question arises upon any of the instructions, whether given or refused. *Blizzard v. Bross*, 56 Ind. 74; *Higbee v. Moore*, 66 Ind. 263; *Stout v. Turner*, 102 Ind. 418.

The judgment is affirmed, with costs.

Filed June 28, 1887.

No. 12,550.

REED v. CHENEY.

PLEADING.—Matters of Description.—Amendment During Trial.—Practice.—

Under section 396, R. S. 1881, the trial court may permit a party to correct a pleading as to a matter of description, even after the evidence in chief has been heard.

NUISANCE.—Public Highway.—Destruction of Culvert.—Restoration by Land-Owner.—Surface Water.—Collecting into Channel and Discharging Upon Land of Neighbor.—Where the natural course of surface water is, and has been for a long period of time, through a culvert in a public highway and thence upon the lands of A., the latter has no right to fill up the culvert, thereby causing the highway to become impassable at times of high water, and, by the construction of a ditch, collect the water into a channel and discharge it in a body upon the lands of B., to his injury. Such acts would be the creation of a nuisance which B. would be entitled to abate by restoring the culvert, doing no wanton or unnecessary injury.

From the Clinton Circuit Court.

J. N. Sims, for appellant.

B. K. Higinbotham, *M. Bristow* and *H. C. Sheridan*, for appellee.

MITCHELL, J.—Reed brought suit against Cheney in the

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court below, alleging that the latter, by means of certain excavations, caused the surface water from lands adjoining to flow over and upon the plaintiff's lands, thereby injuring and destroying his growing crops, grass, etc.

The substance of the defendant's answers was that the plaintiff's land lay on the south, and lower side of a public highway running east and west, and that the defendant owned a body of land lying west of that owned by the plaintiff.

It was averred that the natural course of the surface water from the upper land had been from time immemorial through a culvert lawfully constructed and maintained in the public highway, over and upon the plaintiff's land, and that the plaintiff, prior to the grievances complained of, had wrongfully entered upon the highway and filled up and destroyed the culvert, and had, without right, constructed a ditch westward, in and along the highway through some elevated ground lying between the plaintiff's and defendant's lands, thereby conducting the surface water which had been accustomed to flow through the culvert on to the plaintiff's land, out of its natural course, and discharging it through the ditch so constructed in a body on to the defendant's lands. The defendant charged that the authorities having the highway in control reconstructed the culvert again and again, but that the plaintiff as often destroyed the same. That the destruction of the culvert caused the water to stand upon the highway, thereby rendering it practically impassable on occasions of high water, and that the construction of the ditch, by means of which the water was discharged upon the defendant's land, inflicted great damage and loss upon the defendant. The defendant alleges that he had frequent occasion to use the public highway, that being the most direct way to his post-office and market town, and that, with the consent of the road supervisor, who furnished the lumber therefor, he restored the culvert across the highway, as it had been previously constructed and maintained, so as to permit the water to escape

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and follow its usual course, which he alleges is the identical trespass and injury complained of.

The first error suggested is that the court, during the progress of the trial, and after the evidence in chief had been heard, permitted the defendant, over objections, to amend his answers by changing the word "north" to "south," in those places where it was used in describing the highway.

There is no merit in this objection. The amendment was made in conformity with section 396, R. S. 1881, which authorizes the court at any time, in its discretion, and upon such terms as may be deemed proper in furtherance of justice, to direct a mistake in name or description, etc., to be corrected.

The objections to the answers are not well taken; they present a sufficient defence to the complaint.

While it is true that, upon the boundaries of his own land, not interfering with any natural watercourse, the owner may erect such barriers as he may deem necessary to keep off surface water, or overflowing floods coming from or across adjacent lands, he may not direct surface water from its natural course by collecting into a channel and discharging it upon the lands of his neighbor. *Weis v. City of Madison*, 75 Ind. 241 (39 Am. R. 135), and cases cited.

Nor had the plaintiff the right to fill up and destroy a culvert, lawfully made in a highway for its protection, thereby rendering the highway impassable.

It must be presumed, that if the original construction of the culvert in the highway resulted in injury to the plaintiff's land, damages were assessed and paid in the manner pointed out by the statute. At all events, filling up the culvert, thereby causing the highway to become impassable, and constructing a ditch and collecting the surface water into a channel, and discharging it in a body upon the defendant's land, was the creation of a nuisance, which affected the defendant in such a manner as entitled him to abate it by restoring the culvert, doing no wanton or unnecessary injury.

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Mayhew v. Burns, 103 Ind. 328; *State v. Flannagan*, 67 Ind. 140; *City of Indianapolis v. Miller*, 27 Ind. 394; *Cooley Torts*, 46.

Where a person sustains special injury from a nuisance, even though it be a public nuisance, if the injury be such as would sustain an action at law, the person injured may abate the nuisance to an extent necessary to protect his rights and prevent a recurrence of the injury. *Wood Nuisances*, section 733.

The answers allege, and the demurrers admit, that the culvert was restored with the consent of the road supervisor, and that it was in all respects such a culvert as had been maintained for an indefinite period in the highway by the road supervisors before it was wrongfully destroyed. The answers were in all respects sufficient.

The plaintiff replied by a general denial, and also undertook to reply specially a prescriptive right to carry the surface water westward along a ditch in the highway on and over the defendant's lands.

The special replies were held insufficient. These replies made no effort to justify the destruction of the culvert in the highway by the plaintiff. The answers show that all the defendant did was to restore the culvert, with the consent of the road supervisor. If, therefore, we should concede that the plaintiff had a prescriptive right to maintain the ditch as alleged in his reply, it would not follow that the defendant was liable for restoring the culvert in the manner described in his answers.

There is nothing to show that the defendant in any manner interfered with the ditch into and through which the appellant claims he has a prescriptive right to have the surface water flow. All that the defendant did, if his answers be true, was to restore the culvert, which it is alleged the appellant wrongfully subverted, and to this feature of the answers the replies make no response. The evidence was all

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admissible under the general denial, and, in any event, there was no harmful error in the rulings upon the pleadings.

The foregoing are the only questions discussed.

Having found no error the judgment is affirmed, with costs.

Filed June 30, 1887.

No. 10,401.

DAVIDSON ET AL. v. BATES ET AL.

WILL.—Character of Estate Taken.—Remainders.—A remainder will never be held to be contingent where it can be held to be vested consistently and in harmony with the apparent intention of the testator.

SAME.—Construction.—Vested Remainder.—Under a will executed and probated in 1844, directing that the use and occupation and the rents and profits of certain real estate should be allowed or paid over to his wife during her natural life, for the maintenance and support of herself and a minor son, and that after the death of the wife, and after the son should become of age, such real estate should be divided equally among the testator's children, the children take a vested remainder, subject to the mother's life-estate.

GUARDIAN'S SALE.—Statute of Limitations.—Legal Disability.—Under section 293, R. S. 1881, an action for the recovery of real estate sold by a guardian or commissioner of a court must be commenced within five years after the sale is confirmed; but if the party entitled to maintain the action is under a legal disability, then, under section 296, if the full period of limitation has expired during the existence of the disability, the action must be brought within two years after its removal.

SAME.—Failure to Give Additional Bond.—Collateral Attack.—The failure of a guardian to give the additional bond required by the statute upon a sale of his ward's real estate, is not available in a collateral attack to defeat the sale, notwithstanding the statute of limitations.

From the Marion Superior Court.

G. W. Galvin, for appellants.

S. Claypool and W. A. Ketcham, for appellees.

111	391
112	322
113	221
113	327
117	88
118	514
121	476
111	391
125	186
111	391
129	64
111	391
133	319
133	394
133	604
111	391
136	28
136	178
111	391
138	510
111	391
143	260
143	339
111	391
146	229
147	147
111	391
156	621
111	391
165	612
165	618
111	391
171	384

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Howk, J.—This was a suit by appellants against the appellees, Hervey Bates and Mary J. Vance, to recover the possession of certain described out-lots in the city of Indianapolis. Appellees severed in their defence, and each of them separately answered specially, in a single paragraph, disclaiming title as to part of the real estate sued for, and setting up a defence as to the residue thereof; and they separately filed cross complaints, wherein each of them sought to have the title quieted to so much of the real estate described in the complaint as each of them claimed to own.

Appellants replied specially, in a single paragraph, to appellees' answers, and they answered specially, in a single paragraph, the appellees' cross complaints. Appellees' separate demurrers to appellants' reply and answer to the cross complaints were sustained by the court. Appellants excepted to these rulings, and, declining to amend or plead further, judgment was rendered that they take nothing by their suit, and that appellees recover of them their costs in this action expended. On appeal to the general term the judgment of the court at special term was in all things affirmed, and from the judgment of general term this appeal is now here prosecuted.

In general term below errors were assigned by appellants which call in question (1) the overruling of their demurrer to appellees' separate answers, (2) the sustaining of appellees' demurrers to appellants' reply to appellees' answers, and (3) the rendition of judgment in favor of appellees upon the pleadings herein.

These alleged errors appellants have properly presented here for our consideration. We will consider and decide the several questions presented by these alleged errors in the order of their assignment.

1. In the separate answer of appellee Mary J. Vance, to the complaint herein, she first disclaimed title to or possession of part of the real estate described in such complaint, and as to the residue of such real estate she admitted that she was in possession thereof claiming title thereto, and she

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alleged that appellants were claiming title thereto and possession thereof by reason of the fact that one Noah Noble was formerly the owner and seized thereof at the time of his death, and made disposition thereof by his last will and testament, as would more fully appear thereafter; that the plaintiff Winston P. Noble was the son of said Noah Noble, deceased, and a legatee named in said will, and the other plaintiffs herein were the heirs at law of Catharine M. L. Davidson, the daughter of said Noah Noble, and a legatee named in said will, who died intestate, and the plaintiff Noble was the son, and the other plaintiffs were the grandchildren of Catharine S. Noble, the widow of said Noah Noble, deceased, and a legatee named in his said will, a copy of which will was filed with and made part of such answer. And appellee Vance further said that plaintiffs had not, either of them, nor did they either of them claim to have, any right, title or interest in said property, beyond what was conferred in and by said ownership and will of said Noah Noble, and the relationship of said plaintiffs to said Noble and said will, as above set forth, but, she said that the plaintiffs ought not to be allowed to claim title to said premises, or any part thereof, or to have possession of the whole or any part of such premises, for the reason that, after said Winston P. Noble had arrived at the full age of twenty-one years, he and his wife by warranty deed conveyed and warranted to one Hervey Bates (through whom appellee Vance claimed title), the real estate in controversy as to which she defended this suit; whereby said Winston P. Noble was estopped to say he retained any interest in such real estate; and that in like manner, plaintiff Dorman N. Davidson, before he arrived at the age of twenty-one years, executed his warranty deed conveying to said Hervey Bates (through whom appellee Vance claimed title), the real estate aforesaid, which deed the said Dorman did not, at any time within fifteen years of his arrival at full age, disaffirm, but, on the contrary, on October 20th, 1862, after his arrival at lawful age, he fully ratified

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and confirmed the same, the said Catharine M. L. Davidson having theretofore died, intestate, leaving surviving her Alexander H. Davidson, her husband, and the plaintiffs herein, other than Winston P. Noble, her children, as her heirs at law ; by reason whereof, plaintiff Dorman N. Davidson was estopped to say that he retained any interest whatever in such real estate ; and that in like manner, after the death of said Catharine M. L. Davidson, her husband, Alexander H. Davidson, executed his warranty deed conveying to said Hervey Bates (through whom appellee Vance claimed title), the aforesaid real estate, by means whereof the plaintiffs herein were estopped to say that they acquired any interest in such real estate, by reason of their relationship to said Alexander H. Davidson.

And appellee Vance further averred that theretofore, on April 14th, 1853, one John L. Ketcham was duly appointed by the proper probate court of Marion county, and duly qualified as such, guardian of the estate of said Winston P. Noble, and gave bond for the faithful performance by him of his duties as such guardian, and entered upon the duties of his trust ; that afterwards said Catharine M. L. Davidson departed this life, and said Alexander H. Davidson was thereupon, on the — day of —, 185—, by the court of common pleas of Marion county, duly appointed guardian of the estates of the plaintiffs, Dorman N., Preston A., Noah N., Susan L. and Catharine A. Davidson, said Catharine A. having since intermarried with one Frank Miller, and being the Catharine A. Miller named in the complaint herein, and all of said wards and said Alexander H. Davidson being the only heirs of said Catharine M. L. Davidson, the devisee in said will mentioned ; that afterwards, on July 25th, 1854, John L. Ketcham, guardian of Winston P. Noble, and Alexander H. Davidson, guardian of the plaintiffs herein other than said Noble, filed their joint petition in such court of common pleas for the sale of real estate, setting forth therein, among other things, that their wards had no

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personal estate whatever, that such wards were tenants in common of said real estate, and that the sale thereof was necessary for the support and education of said wards, and for the enhancement in value of the remainder of said property; that, upon such petition, the court ordered the sale of such real estate, and appointed John L. Ketcham a commissioner to make such sale, who thereupon qualified and gave bond for the faithful performance of the duties of his trust; and that said Catharine S. Noble, widow of Noah Noble, deceased, consented in writing to such order of sale.

And appellee Vance further averred that the real estate in controversy, as to which she defends this suit, was duly appraised under said order of sale at \$2,500 for each out-lot; that afterwards said commissioner duly sold such real estate to said Hervey Bates for the sum of \$10,250, being \$2,750 in excess of the appraised value of each out-lot, which sale was duly reported by said commissioner to such court of common pleas, on October 19th, 1857, and was then and there approved and confirmed by such court; that, thereupon, said commissioner executed his deed conveying to said Hervey Bates all the right, title and interest of the said minor heirs of said Catharine M. L. Davidson, deceased, in and to such real estate, said Winston P. Noble having theretofore arrived at the full age of twenty-one years; that, thereupon, on October 20th, 1857, and more than five years before the commencement of this suit, said Hervey Bates entered upon and took possession of such real estate, and continued in the quiet and peaceable possession thereof, such possession being adverse to the claim of plaintiffs herein, said Hervey Bates claiming title thereto and the lawful ownership thereof, for more than eighteen years, or until his death in 1876, testate, devising his real estate to this appellee, Mary J. Vance, and her co-appellee, Hervey Bates, as tenants in common; that afterwards, in 1876, the appellees, Vance and Bates, by mutual agreement between themselves, made partition of the real estate so devised to them, and appellee Bates conveyed

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to appellee Mary J. Vance, all his interest in the out-lots described in her answer herein.

And appellee Vance averred that at all times subsequent to October 19th, 1857, until his death, said Hervey Bates continued in possession of the premises aforesaid, claiming to be the owner thereof by virtue of said deeds from said Winston P. Noble, Dorman N. and Alexander H. Davidson, and from said Ketcham, commissioner as aforesaid; and the plaintiffs herein did not, within five years after said sale, nor within five years subsequent to their arrival at the full age of twenty-one years, nor within twenty years from said Winston P. Noble's arrival at the full age of twenty-one years, institute their action for the possession of said real estate. Wherefore appellee Vance said that plaintiffs herein were not entitled to the possession of said real estate, and she prayed judgment for her costs, etc.

The answer of appellee Bates herein differs from the answer of appellee Vance, the substance of which we have given, chiefly in this, that he disclaimed as to those out-lots, described in appellants' complaint herein, which Mrs. Vance claimed to own in her answer, and he asserted title in himself to the other out-lots sued for, as to which Mrs. Vance filed her disclaimer herein.

The two answers stated, substantially, the same defence to appellants' action, and must stand or fall together.

Appellants' demurrer to these separate answers was overruled by the court at special term, and this ruling constitutes the first supposed error of which complaint is here made by their counsel.

Before considering any of the questions presented and discussed by appellants' learned counsel under this alleged error, we note the fact shown by the record that, on the 5th day of December, 1878, and before final judgment was rendered herein in appellees' favor, on May 8th, 1882, by the court below at special term, Winston P. Noble and Dorman N. Davidson, two of the original plaintiffs herein, dismissed

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this action as to themselves, but without prejudice to the rights of their co-plaintiffs, or either of them, in or to the real estate in controversy.

The out-lots in controversy in this action, to wit, out-lots adjoining the town (now city) of Indianapolis, numbered 67, 68 and 69, were owned by Noah Noble, at one time Governor of this State, at and before his death in February, 1844. Noah Noble died testate, leaving surviving him his widow, Catharine S. Noble, and Catharine Davidson and Winston P. Noble, his only children and heirs at law. The last will of Noah Noble, deceased, was dated February 7th, 1844, and was duly admitted to probate by and before the clerk of the probate court of Marion county, on the 2d day of April, 1844. This will was the subject of controversy, and its provisions, which affect the title to the real estate in controversy in the cause now before us, were carefully examined and considered by this court in *Davidson v. Koehler*, 76 Ind. 398. All the appellants in the suit now pending were appellants in and parties to the case cited. In the opinion of the court, in that case, all the provisions of the last will of Noah Noble, deceased, which have any bearing upon the title to the real estate now in controversy, are set forth at length, commencing on page 402 of 76 Ind., and we refer to those testamentary provisions, found on that and subsequent pages, as a part of this opinion, without setting them out herein.

It will be seen from the *second* item of such last will, that the out-lots numbered 67, 68 and 69, in controversy in the suit now pending, together with other parcels of real estate there mentioned, are therein described by the testator, in effect, as constituting "my home farm;" and by and under that name, all such parcels of real estate, including the out-lots now in controversy, were disposed of by such testator in his last will.

In *Davidson v. Koehler*, *supra*, one of the questions presented for our decision (and the same question arises in the case in hand) was this: Under such last will, what was the

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nature and extent of the estate which the testator's children and devisees, Winston P. Noble and Mrs. Catharine Davidson, took in such "home farm," subject to the estate of the testator's widow, Mrs. Catharine S. Noble therein? On behalf of appellants, it was then contended that, at the death of the testator, the interest taken by his two children aforesaid in the "home farm," under his last will, was an executory devise or contingent remainder; while it was then earnestly insisted for and on behalf of appellees, that the interest so taken by the testator's two children in the "home farm," under his last will, was a vested remainder.

Upon full consideration of the question stated, in the case last cited, we then held that, at the death of the testator, the estate taken by his two children aforesaid in the "home farm," under his last will, was a vested remainder. In the case under consideration, in discussing the alleged error of the court at special term, in overruling appellants' demurrer to the separate answers of appellees herein, the only point made by appellants' learned counsel in his brief of this cause, is thus stated: "We earnestly insist that the decision of this court in *Davidson v. Koehler*, *supra*, that the remainder created by the will of Governor Noble was vested, is erroneous." Upon this point we do not agree with appellants' counsel. We are of opinion that, in the case referred to, we gave a correct construction to the devise by Governor Noble of his "home farm," in his last will, and we adhere to that construction, tenaciously and without doubt, in the cause we are now considering. The law is said to favor the vesting of estates, and a remainder will never be held to be contingent where, as in this case, it can be held to be vested, consistently and in harmony with the apparent intention of the testator. *Harris v. Carpenter*, 109 Ind. 540, and authorities cited. See, also, *Bailey v. Sanger*, 108 Ind. 264.

This point being settled adversely to appellants, namely, that their mother, Mrs. Catharine Davidson, under whom they claimed title to the out-lots in controversy herein, took

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a vested remainder in the "home farm" of her father, Governor Noble, at his death under his last will, it is very clear, we think, that no error was committed by the court below at special term in overruling appellants' demurrer to the separate answers of appellees herein.

Mrs. Catharine Davidson died, intestate, in March, 1857, leaving surviving her, as her heirs at law, Alexander H. Davidson, her husband, and the appellants, and Dorman N. Davidson, an original plaintiff herein, as her only children. When Mrs. Davidson died all of her children were infants, under the age of twenty-one years, and their father, Alexander H. Davidson, was duly appointed and qualified as guardian of their persons and estates. Afterwards, on the petition of such guardian, an order was made by the court of common pleas of Marion county, which court had jurisdiction of the subject-matter of such petition and of the persons of the parties thereto, for the sale of the real estate in controversy as the real estate of his said wards; and John L. Ketcham was appointed by such court a commissioner to make such sale, who qualified and gave bond for the faithful performance of the duties of his trust as such commissioner. Afterwards Commissioner Ketcham sold the out-lots now in controversy to Hervey Bates, Sr., for more than the full appraised value thereof, and reported such sale to the proper court on October 19th, 1857, and such sale was then and there approved and confirmed by such court; and thereupon Commissioner Ketcham executed his deed conveying to said Hervey Bates all the right, title and interest of the then minor heirs of Mrs. Catharine Davidson, deceased, in the out-lots now in controversy. On October 20th, 1857, Hervey Bates, Sr., took possession of such out-lots, and continued in the quiet and peaceable possession thereof, claiming title and possession adverse to any claim of appellants thereto, until his death, in 1876, testate, devising such real estate to appellees, as tenants in common.

It was averred that appellants did not, within five years

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after such sale, nor within five years subsequent to their arrival at the full age of twenty-one years, institute their action to recover the possession of the real estate in controversy herein.

The facts stated by appellees, in their separate answers herein, were amply sufficient to withstand appellants' demurrer thereto. These answers were filed below on the 7th day of February, 1878, and at that time the civil code of 1852 was still in full force. It is manifest that appellees set up in their respective answers the limitation provided in the *fourth* clause of section 211 of the civil code of 1852, which required that actions "for the recovery of real property sold by * * guardians or commissioners of a court," etc., should be commenced "within five years after the sale is confirmed." This section and the *fourth* clause thereof were re-enacted as section 38 of the civil code of 1881, and this latter section is known as section 293, R. S. 1881.

Under the averments of appellees' answers herein, the five years statute of limitations commenced to run against appellants' cause of action, stated in their complaint in this case, on the 19th day of October, 1857, on which day the sale by Commissioner Ketcham of the real estate in controversy herein was confirmed by the proper court. This was so, under our decisions, notwithstanding the fact apparent in this case that, at the time of the confirmation of the sale of such real estate by the proper court, each and all of such appellants were, and, for some years thereafter, continued to be infants, under the age of twenty-one years. Under our statute (section 215 of the civil code of 1852, and section 296, R. S. 1881), and our decisions construing the statute, the only effect of appellants' disability of infancy was to give each of them, if the full limitation had run during his or her infancy, two years after the disability was removed within which he or she might sue. *Wright v. Kleyla*, 104 Ind. 223; *Walker v. Hill*, *ante*, p. 223.

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Appellants' demurrer to the separate answers of appellees herein was correctly overruled.

The only other error discussed by appellants' counsel, in his brief of this cause, is the sustaining of appellees' demurrers to appellants' reply to the separate answers of appellees herein. In their reply to such answers appellants alleged, among other things, that their guardian, Alexander H. Davidson, in procuring the order of the court of common pleas for the sale of the real estate in controversy, under which order appellees claimed title, never gave the additional bond required by the statute, "in double the appraised value of such real estate, with condition for the faithful discharge of his duties and the faithful payment and accounting for of all moneys arising from such sale, according to law;" and that the proceeds of the sale of such real estate were never accounted for by their said guardian. Upon these averments of the reply, admitted to be true as the case is now presented, it is earnestly insisted that it was error to sustain the demurrer to such reply. The utmost that can be said, however, of the effect of the guardian's failure to file such additional bond, is that such failure rendered the sale of such real estate void, or, rather, that for such failure the sale might have been "avoided," in a direct suit or proceeding brought for that purpose, within the proper time. Section 538 of civil code of 1852; section 2364, R. S. 1881; *McKeever v. Ball*, 71 Ind. 398.

In their reply, in the case at bar, appellants collaterally attack the sale of the real estate to Hervey Bates, Sr., made under an order of the court having jurisdiction of the subject-matter and of the parties. The case of *McKeever v. Ball*, *supra*, cited and relied upon by appellants' counsel, lends no support whatever to the sufficiency of the reply in this case. For the case cited was a direct attack upon the validity of a guardian's sale of real estate, for the want of an additional bond; and, in that case, the statute of limita-

Hicks v. The State.

tions was not set up in aid of the validity of the sale, and in bar of the suit to avoid such sale, as it was in the case we are now considering. We are of opinion that the facts stated in appellants' reply herein were not sufficient to avoid the defence of the statute of limitations, pleaded by appellees in bar of appellants' cause of action, and that the demurrer to such reply was correctly sustained.

Under the averments of appellees' answers, the cause of action stated in the complaint herein was fully barred by the statute of limitations there pleaded, long before the commencement of this suit. This is so, under our decisions, even if it be conceded that, upon the facts stated in appellants' reply herein, the commissioner's sale and conveyance of the real estate in controversy were absolutely void. *Hatfield v. Jackson*, 50 Ind. 507; *Brown v. Maher*, 68 Ind. 14; *Ray v. Detchon*, 79 Ind. 56; *Second Nat'l Bank, etc., v. Corey*, 94 Ind. 457; *Wright v. Wright*, 97 Ind. 444; *Walker v. Hill*, *supra*.

The record of this cause discloses no error therein which authorizes or requires a reversal of the judgment.

The judgment is affirmed, with costs.

ELLIOTT, J., took no part whatever in the consideration or decision of this cause.

Filed June 30, 1887.

111 403
115 212

No. 13,859.

HICKS v. THE STATE.

CRIMINAL LAW.—Arraignment and Plea.—Reversal of Judgment.—Where, in a criminal case, the record does not show that the defendant was arraigned or waived arraignment, or that a plea was entered by or for him, a judgment of conviction will be reversed.

From the Switzerland Circuit Court.

, Bish et al. v. Beatty.

J. A. Works and *L. O. Schroeder*, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

ZOLLARS, C. J.—The record not showing that appellant was arraigned or waived it, nor that a plea was entered either by or for him, there is no alternative but to reverse the judgment. *Bowen v. State*, 108 Ind. 411, and cases there cited.

The judgment is reversed, and the clerk is directed to make the proper order for the return of appellant to the custody of the sheriff of Switzerland county to await further proceedings.

Filed June 29, 1887.

111	408
119	340
111	408
160	317

No. 12,710.

BISH ET AL. v. BEATTY.

WITNESS.—*Examination of Party.*—*Notice.*—*Refusal to Attend.*—*Contempt.*—*Striking Out Pleadings.*—Where the defendant to an action is notified by the plaintiff to appear before a justice of the peace to be examined as a party, under section 509, R. S. 1881, touching matters alleged in the complaint, but no summons is issued by the officer, his failure to attend in response to the plaintiff's notice does not constitute a contempt for which, under section 513, his pleadings in the cause may be stricken out.

SAME.—*Judgment as Upon Default.*—*Showing Necessary to Authorize.*—In such case, to authorize the striking out of the defendant's pleadings and the rendering of judgment for the plaintiff as upon a default, it should also appear that the plaintiff, or some one in his behalf, attended at the time and place mentioned in the notice, and that he desired and was ready to examine the defendant concerning a matter stated in the pleadings.

FRAUD.—*Conveyance.*—*False Representations as to Value of Promissory Notes.*—*Damages.*—An innocent party who is induced to convey valuable property by a reliance upon false representations of the purchaser that prom-

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issory notes, executed by a third person, which are taken in exchange for the property, are good and well secured, when in fact they are worthless, is entitled to damages.

From the Starke Circuit Court.

H. R. Robbins, for appellants.

A. I. Gould, for appellee.

MITCHELL, J.—Bish and wife brought an action in the Starke Circuit Court against Beatty to recover damages for alleged false and deceitful representations, by means of which it is averred the latter induced the plaintiffs to transfer certain real and personal property owned by them to the defendant, and to accept in part payment therefor certain worthless promissory notes executed by a third person.

The defendant answered by a denial. There was a verdict and judgment below for the defendant.

It appears from a bill of exceptions that after the parties appeared in the court below, the plaintiffs moved for judgment against the defendant as upon a default. This motion having been overruled, and the defendant having answered in denial, the plaintiffs moved to strike out the answer.

These motions were predicated upon a showing from which it appeared, that after filing their complaint the plaintiffs gave the defendant due notice to appear before a justice of the peace within the county in which the defendant resided, at a time and place named, for the purpose of being examined as a party, under the statute, touching matters alleged in the complaint. This notice appears to have been duly served. The justice before whom the examination was to have taken place, certified that the defendant failed to appear, in compliance with the notice. A similar notice, and a like certificate from the justice, in respect to a second attempt, on a later date, to secure the defendant's examination, appear in the record.

The first alleged error of the court below is predicated

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upon the rulings in respect to the several motions above referred to.

Section 509, R. S. 1881, provides that a party to an action may be examined as a witness at the instance of the adverse party "concerning any matter stated in the pleading," and for that purpose his attendance may be compelled as any other witness, either at the trial, or conditionally, or upon commission. Subsequent sections of the statute make provision that the examination may be had before the trial, before any officer authorized to take depositions, by giving the party to be examined, and any other adverse party, not less than five days notice. The attendance of a party may be enforced, and his refusal to attend and testify may be punished as for a contempt, and the complaint, answer or reply of the party in default may be stricken out. Rightly used, these statutes are important factors in the administration of justice. They are to be applied with a view to attain just ends, and not as mere instruments by which one party may harass his adversary. A party to an action may be examined either at or before the trial concerning any matters stated in the pleading, and for that purpose his attendance at the trial, or before an examining magistrate or person properly authorized, may be enforced. Failing to attend for such an examination, or having attended, failing to answer pertinent questions, he may be subjected to the consequences prescribed in the statute. Thus, in the case of *Chaffin v. Brownfield*, 88 Ind. 305, where a party, having appeared in response to a notice, afterwards refused to answer certain questions propounded to him by his adversary, and refused to produce certain letters and documents which he had been notified to produce, it was held, that because the matters about which inquiry was made were *not* concerning any matter stated in the pleading, but were irrelevant and impertinent, the party was fully justified in refusing to answer.

In the case before us there is nothing in the notices, or in the showing filed in support of the motions, upon which error

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is predicated, which in any manner indicates the subject-matter concerning which it was proposed to examine the defendant; nor does it appear that the plaintiff, either in person or by attorney, appeared before the magistrate, or that they were in any manner prepared to examine the defendant upon any subject. All that appears is, that notice was duly given by the plaintiffs that on a certain day they would proceed to examine the defendant at a certain place, before a certain officer, touching the allegations in their complaint, and that the defendant failed to attend. It does not even appear that any subpoena or other notice from the examining officer was ever given or served upon the defendant requiring him to attend.

In the case of *Trippe v. Carr*, 80 Ind. 371, the parties had been duly summoned and failed to appear. The adverse party stated to the court what he expected to prove by the parties in default, in case they had appeared. In that case it was held, that the refusal of the court to strike out the answers of the parties so failing was error. So, in the case of *Belton v. Smith*, 45 Ind. 291, the parties had been duly summoned to testify, as is there said, "in reference to a matter peculiarly within their knowledge." Having failed to appear, it was held that the court properly treated the allegations of the complaint affecting them as true.

Our conclusion is, no summons having issued, the defendant was not in contempt of the process of any court or officer for not attending upon the notice of the plaintiffs, and hence was not subject to the consequences provided in section 513, which authorizes the court in a proper case to punish as for a contempt, and to strike out the complaint, answer or reply of the party in default. Moreover, it should have appeared that the plaintiffs, or some one in their behalf, attended at the time and place mentioned in the notice, and that they desired and were ready to examine the defendant concerning some matter stated in the pleading.

It can hardly be within the spirit and purpose of the stat-

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ute that one party may give the other notice to appear for examination before any justice of the county, and, in case neither party gives the matter any further attention, the party notified may be treated as in contempt nevertheless.

There was no error in the rulings of the court. The motion of the appellants asking the court to order the appellee to submit to an examination, was, under the circumstances, and in view of the counter showing which appears in the record, properly overruled.

A great number of questions of minor importance arising on rulings in respect to the admissibility of evidence are stated, and some of them more or less discussed in the appellants' brief. The questions are not of sufficient importance to justify us in stating them in detail, even if we should concede that they are presented within the rule. There was, so far as we can discover, no error in the rulings of the court in this regard.

Complaint is also made concerning the giving by the court, of its own motion, of certain instructions to the jury, and also of the refusal to give certain instructions requested by the plaintiffs. Upon examination of all the instructions given, and considering them with reference to the evidence in the record, it appears that the law of the case was fairly presented to the jury. Such of the appellants' instructions as stated the law correctly were adequately covered by the charges given by the court.

Passing over the alleged misconduct of the bailiff and one of the jurors, an examination of the evidence constrains us to the conclusion that it does not sustain the verdict as to Mrs. Bish. It appears from the evidence that the real estate for which the notes in question were exchanged, belonged in part to Mrs. Bish. The defendant admits that he told her the notes were well secured, and says further that he may have told her they were as "good as government bonds." The whole testimony shows that this statement was not true, and that it was relied on by an unsuspecting and inexperi-

Sterne v. Vert *et al.*

enced woman, greatly to her injury. As to Mrs. Bish there is no conflict in the evidence that she parted with her property on the faith of the defendant's statements that the notes were good and well secured. This was not true. There are other features of the evidence which might be the subject of unfavorable comment, even as to the appellant Bish. As the conclusion reached results in the holding that the court erred in overruling the motion for a new trial, we forbear any further examination of the evidence.

Judgment reversed, with costs, with directions to the court below to sustain the motion for a new trial.

Filed June 28, 1887.

111	408
120	267
111	408
128	260
129	290
111	408
143	183
111	408
144	167

No. 13,698.

STERNE v. VERT ET AL.

SUPREME COURT.—*Appeal.*—*Party Accepting Benefit of Judgment not Allowed to Appeal.*—*Mortgage.*—*Foreclosure.*—*Sale.*—*New Trial as of Right.*—Where in an action to foreclose a mortgage upon three tracts of land there is a decree of foreclosure rendered as to two of the tracts, and a judgment against the plaintiff as to the third tract, the latter can not, after a sale of the two tracts under the decree, prosecute an appeal to the Supreme Court to obtain a reversal of the judgment as to the third, nor can he prosecute such an appeal from a ruling of the court below overruling his motion for a new trial, as a matter of right, as to such third tract.

NEW TRIAL AS OF RIGHT.—*Title to Real Estate not Involved in Foreclosure Proceedings.*—*Cancellation of Mortgage.*—*Judgment.*—*Quieting Title.*—Where, in a foreclosure proceeding, judgment is rendered for the defendant on a cross complaint which prays the cancellation of the mortgage, and that his title be quieted in respect thereto, the case is not one which involves the title to real estate in such sense that a new trial as a matter of right should be allowed.

From the Hamilton Circuit Court.

T. J. Kane and *T. P. Davis*, for appellant.

F. M. Trissal, for appellees.

Sterne v. Vert *et al.*

MITCHELL, J.—The facts involved are stated in *Sterne v. Vert*, 108 Ind. 232. The appellant having obtained a decree foreclosing a mortgage upon two of three separate parcels of land, it was there held that, having sold the tracts upon which she had obtained the decree, she was thereby estopped from prosecuting an appeal to this court to secure a reversal of the judgment as to the third tract, in respect to which the decree was adverse to her.

After the appeal was dismissed, the appellant, having filed the proper undertaking for costs within a year from the rendition of the original judgment, moved the court for a new trial as a matter of right, in respect to the judgment quieting the appellees' title as against the mortgage on the forty-acre tract.

The defendants appeared in the court below by their guardian *ad litem*, and were permitted to show, in opposition to the motion and application for a new trial as a matter of right, that since the rendition of the original judgment and decree, the plaintiff, by virtue of the decree in her favor, had sold two of the tracts of land involved in the litigation, and that she had realized from such sale ten hundred and fifty dollars, which had been credited upon the decree. The court thereupon overruled the motion for a new trial. From this ruling the appeal now before us is prosecuted.

The appellees have appeared in this court, and by an answer bring upon the record substantially the facts exhibited to the court below, which are, in substance, the same as those upon which the former appeal was dismissed. Upon the facts so brought forward, they again move to dismiss the appeal.

The record before us shows the facts, and the same reasons which induced the former dismissal are operative to produce a like result upon the motion now made.

It may be well to remark, the suit having been brought for the foreclosure of a mortgage, and the cross complaint having asked nothing more in effect than the cancellation of the mortgage in suit, and that the cross complainant's title

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should be quieted in respect to the mortgage, that the case was not one which involved the title to real estate in such sense that a new trial as a matter of right was allowable. *Voss v. Eller*, 109 Ind. 260.

The appeal is dismissed, at the appellant's costs.

Filed June 30, 1887.

No. 13,187.

BOARD OF COMMISSIONERS OF MONTGOMERY COUNTY
v. FULLEN ET AL.

GRAVEL ROAD.—*Act of 1885 did not Repeal Former Acts.*—The act of April 8, 1885, concerning gravel and macadamized roads, did not repeal the former acts covering that subject, hence, assessments and proceedings under the act of 1877, and the authority thereby conferred upon the board of county commissioners, are not affected by the later statute.

SAME.—*Cost to be Borne by Land Benefited.*—*Legislative Intention.*—It was the intention of the Legislature in the enactment of the gravel road laws to make the land benefited by improvements thereunder bear the whole expense of such improvements.

SAME.—*Additional Assessment.*—*Power of County Commissioners to Make.*—The board of commissioners has authority to levy an additional assessment, not exceeding the special benefits conferred upon the land, to pay the cost of the improvement, in case the original assessment proves insufficient, and it may do so of its own motion, without a petition.

SAME.—*Matter of Additional Amount to be Referred to Viewers.*—*Notice.*—The board of commissioners can not itself determine the additional amount to be assessed against the land-owners, but notice must be given and the matter referred to the viewers, as in the first instance.

SAME.—*Agency.*—*Respondent Superior.*—In directing the construction of free gravel roads and levying assessments the board of commissioners is not the agent of the county, and the maxim *respondent superior* can not apply in any form.

SAME.—*Cost of Improvement.*—*Liability of County.*—The fact that a free gravel road when constructed becomes public, does not make the county liable for the cost of the improvement beyond the original estimate.

From the Montgomery Circuit Court.

111 410
111 308
112 365
114 177
114 203
115 226
115 330
118 121
121 448

111 410
124 208
124 471
125 555
127 505

111 410
128 239

111 410
130 518

111 410
132 29

111 410
137 380
137 385

111 410
143 512

111 410
146 167
147 508

111 410
148 473
152 324
152 325

111 410
153 256

111 410
156 663

111 410
159 270

111 410
170 617

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G. W. Paul, J. E. Humphries, B. Crane, J. H. Burford, A. B. Anderson, W. H. Thompson, J. West, S. O. Bayless, W. H. Russell, J. V. Kent and J. W. Merritt, for appellant.

P. S. Kennedy, S. C. Kennedy, J. Wright and J. M. Seller, for appellees.

ELLIOTT, J.—In the case of *Robinson v. Rippey, ante*, p. 112, we held, after a very full examination of the question, that the act of April 8th, 1885, entitled “An act concerning gravel and macadamized roads,” did not repeal the former acts covering that subject, and that decision disposes of one of the important questions in this case. As the act of 1877 was not repealed, assessments and proceedings under it are not affected by the later statute, and the authority conferred upon the board of commissioners by the act of 1877 still exists.

The questions in this case not disposed of by the decision in *Robinson v. Rippey, supra*, are these :

First. Has the board of commissioners authority to make an additional assessment to pay the cost of the improvement, in case the original assessment proves insufficient?

Second. Can the board of commissioners, of its own motion and without a petition, direct the levying of an additional assessment?

Third. Can the board itself determine the additional amount to be assessed against the land-owners respectively, or must it refer the matter to the viewers, as in the first instance, to determine and report the amount to be assessed as benefits?

Of these questions in their order: First. The purpose of the Legislature in the enactment of our gravel road laws is very plainly apparent, for it appears everywhere throughout the statutes, in their express provisions, in their general scope and in the character of the machinery provided for carrying the law into effect. It is impossible to mistake the purpose of the Legislature, for nothing can be clearer than that it was the intention to make the land benefited by the

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improvement bear the expense. It was not intended that the expense should be paid out of the county treasury in any event, but that it should in all cases be paid by those who received a special benefit. This intention it is the duty of the courts to carry into effect, if it can be done without doing violence to the language employed by the Legislature.

It is a familiar rule that the grant of a principal power carries by necessary implication all incidental powers essential to the effectual exercise of the principal power. In this case the principal power granted is to improve highways at the cost of adjacent land-owners, and all incidental powers necessary to the exercise of this principal power are vested in the tribunal to which it is granted. If all the expense must be paid by the property benefited, and the board of commissioners is clothed with the power to compel the property to bear that burden, then it must possess the means of effectively exercising that power. It would be idle to declare that the board has power to compel the property to pay the cost of improving the highway and yet deny it the means of effectively exercising that power. Once it is granted that the law charges the entire expense of improving the highway upon those specially benefited, it must follow that it possesses the incidental power to put and continue in motion the machinery by means of which the power is executed.

It is important to keep constantly in mind that the law requires that the entire cost shall be collected from the property-owners, for it was not intended that in any event, or upon any possible contingency, should the cost be paid out of the county treasury. As the clear intention of the Legislature was that the whole expense of the improvement should be paid by the property benefited, it must follow that the power to carry into effect the intention of the Legislature is a continuing one, and that it is not exhausted by its exercise in the first instance. There are many cases in which a power will be deemed a continuing one without any express declaration to that effect. *Macy v. City of Indianapolis*, 17

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Ind. 267; *Welch v. Bowen*, 103 Ind. 252; *Goszler v. Corporation of Georgetown*, 6 Wheat. 593.

It seems to us that the power of the commissioners to assess the entire cost of the improvement upon the property must be deemed a continuing one, since, if it be held otherwise, there are cases in which the leading and manifest purpose of the Legislature can not be carried into effect. If it be true, as surely it is, that the purpose was to make the property bear the whole expense, then it must also be true, that there is a power lodged somewhere to execute this purpose. The one proposition necessarily leads to the establishment of the other. Again, if it be true that there is a power to carry the clearly manifested legislative purpose into execution, then it must also be true that the power to make an additional assessment exists in all cases where it is necessary to effectually execute the purpose.

The construction of a free turnpike or gravel road is not, in a strict legal sense, a county matter, for the commissioners do not levy assessments by virtue of their position as the official representatives of the county, but by virtue of an express statute specially conferring that power upon them. They are not, at least so far as the property-owners are concerned, acting as the agents of the county while exercising the powers conferred by the statute, and it is legally impossible to conceive any valid reason why the county should sustain any loss because of their errors, negligence or wrongs. If they are not the agents of the county, then loss ought not in any event to fall upon the county, and the only way in which to prevent this is to hold that an additional assessment may be made when the first proves insufficient. The position occupied by the board of commissioners is very similar to that occupied by the common council of a municipal corporation in levying assessments for street improvements, and it is settled that in such cases there is no liability on the part of the corporation for the errors or negligence of its officers, but that the property is alone liable for the

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cost of the improvement. *City of New Albany v. Sweeney*, 13 Ind. 245; *Johnson v. Common Council, etc.*, 16 Ind. 227; *City of Greencastle v. Allen*, 43 Ind. 347; *Wren v. City of Indianapolis*, 96 Ind. 206, 216.

The principle asserted in the cases cited applies here, for they proceed on the theory that in making the assessments the common council is not acting as the agent of the city.

In the case before us the commissioners must have authority to make an additional assessment or part of the expense of improving the highway must fall upon the county, for bonds were issued under the provisions of section 5097 of the statutes, and these bonds impose an obligation upon the county which at least requires the commissioners to make an additional assessment to pay them. It is very clear that it was not intended that the bonds issued by the commissioners should be the general debt of the county, but that they should be paid out of the assessments levied upon the property benefited by the improvement. The assessment constitutes a specific fund out of which the bonds must be paid, for there is no authority to charge them upon any other fund, nor to make them a general charge upon the county. If the first assessment does not yield enough to do the work and pay the bonds, then the commissioners must have authority to levy an additional assessment, or the loss will fall upon the county, and this is the very thing the Legislature intended to prevent. Either there must exist authority to levy an additional assessment or there must be a contingency in which the expense will be paid out of the county treasury; but there can be no such contingency, and, therefore, there must be authority to levy an additional assessment.

It is obvious that contingencies may arise in which the actual cost of the improvement will be greater than the estimated cost and greater than the assessment, and it must be presumed that the Legislature was not unwindful of this fact when it enacted the statute. If it is to be presumed that the Legislature did have this fact in mind, then, as it has com-

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manded that the expense shall be borne by the property benefited, it must be held that it was the intention to invest the board of commissioners with authority to make an additional assessment in case of necessity. It is apparent that there are many cases in which, from causes which ordinary human foresight and prudence can not provide against, one of three courses must be pursued by the board of commissioners: one of these is to pay the additional expense out of the county treasury; another is to abandon the improvement, lose all that may have been done, and break the contract; the other is to levy an additional assessment. The first of these methods can not be pursued, because the law forbids it; the second can not be adopted, because it would be unjust, as it would leave many of those, if not all, who had paid, or were liable to pay, assessments, without substantial benefit; but the third course may be pursued, because it is productive of just results, and carries into effect the purpose of the statute.

The principle which we assert here has been recognized in other cases. In the cases of *Gavin v. Board, etc.*, 81 Ind. 480, *Board, etc., v. State, ex rel.*, 86 Ind. 8, and *Miles v. Ray*, 100 Ind. 166, it was decided that the board of commissioners has power to levy an additional tax to pay an appropriation in aid of a railroad company where the original levy proves insufficient. These cases are based upon the same theory as that on which we are proceeding in this, although they carry the principle which they assert much further than we are required to do here. The Supreme Court of Illinois has asserted a like principle in drainage cases. *Commissioners, etc., v. Kelsey*, 11 N. E. Rep. 256.

In the able brief of appellees' counsel we are referred to the provision of the statute that "no bid shall be accepted which exceeds the estimated cost" (R. S. 1881, section 5095), and we are asked to decide that this provision restricts the power to go beyond the cost estimated by the engineer. We have no doubt that this provision does prohibit the commis-

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sioners from entering into a contract in cases where the known cost exceeds that estimated, and all the facts are known to the commissioners; but we can not believe that this provision prohibits the levying of an additional assessment where the cost has been increased by some unforeseen cause. While we think that this provision would give the property-owners a right to prevent the board of commissioners from making and enforcing a contract, agreeing to pay more than the estimated cost, if proper and seasonable steps were taken, still, we do not think that it applies to a case where no objection is made, and the cost is increased by subsequent occurrences or causes not anticipated or foreseen. It may often happen, as we have already suggested, that, despite all the care that can be exercised, the estimate will not be large enough to cover all the cost, and that subsequent occurrences which could not be anticipated will augment the cost; and our opinion is that the provision under immediate mention does not apply to such cases, but is only applicable to cases where the facts are all known to the board of commissioners.

It is no doubt true, as counsel contend, "that the Legislature contemplated that the whole cost of constructing a road should be ascertained before proceeding to construct it," but we can not from this conclude that a mistake, or even a breach of duty, on the part of the commissioners would fasten a liability on the county. The conclusion that the county is liable can not be reached without supplying another premise, namely, that the commissioners are the agents of the county, and this premise can not be supplied, because, in directing the construction of free gravel roads and levying assessments, the commissioners are not the agents of the county. The county is not their principal, and the maxim *respondeat superior* can not apply in any phase or form. It may, therefore, be fully conceded that it is the duty of the commissioners to ascertain the cost in advance without leading to the conclusion that if they fail in this duty the county must bear the loss. But the duty of the commissioners to

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see to it that no part of the cost is put upon the county is clearer and more important by far than the duty to ascertain the cost in advance, and it is the duty of persons specially benefited to see that no steps are taken which will put any part of the expense upon the county. If the contingency which augments the expense is one which could be foreseen, the property-owners ought, in justice to the county, to suggest it; and if it is not, they, who are specially benefited, are hardly in a situation to complain that others did not foresee what they themselves were unable to perceive. If it be true that the commissioners are knowingly and wilfully about to let a contract, agreeing to pay more than the estimated cost, the property-owners who are specially interested ought to take seasonable steps to prevent it, and not lay by and see the expense incurred and then escape the burden.

It is provided by the statute that "The county auditor, before placing the said assessment upon the duplicate, shall reduce or add to the same, *pro rata*, the amount the actual expense shall be found to be, more or less than the estimate." R. S. 1881, section 5096. Proceeding on this provision, counsel argue that there is an implied prohibition upon an additional assessment; but we regard this argument as unsound, for the reason that the provision quoted refers to matters known before the assessment goes upon the duplicate, and because it does not apply to future occurrences augmenting the expense of the improvement. It is simply a direction to pursue a designated course respecting the original assessment, and does not refer to an additional assessment made necessary by facts or occurrences not known when the auditor undertakes to place the assessment on the duplicate.

We are also referred to the provision that "all the lands liable to assessment, under the provisions of this act, for the construction of such road, shall be held responsible to the county, to protect the county against all loss or liability arising from any judicial proceeding affecting the assessments for

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benefits, and also all costs and expenses that may arise in any litigation; and reassessments may be made to discharge the same" (R. S. 1881, section 5102); and we are told that this provision by implication forbids a reassessment for any other purpose. We entertain a very different opinion. We regard this provision as a full recognition of the right to make an additional assessment for the purpose of paying the cost of constructing the road, for it implies that this right exists, and adds a new element of expense, namely, that arising from judicial proceedings and litigation. The provision adds to the element of expense the items designated, and for that purpose such a provision was necessary; because, without it, the expense of litigation could not be considered a part of the cost of constructing the road. The provision quoted adds to the powers of the board of commissioners, but does not subtract from them. It tacitly, at least, recognizes the power to make an additional assessment for the direct expense of constructing the road, and by no means excludes the implication that such a power exists. That such a power does exist the whole scope and spirit of the law plainly indicates, and the special provision quoted adds strength to the conclusion that the board does possess this power. The intention of the provision was to add another element to the expense, and not to abridge any power expressly granted or conferred by necessary implication. As we said in *Gavin v. Board, etc.*, 104 Ind. 201, this provision indicates that "The statute is careful to protect the county interests and to guard against the use of the general funds of the county to pay any part of the expenses incident to the construction of a free gravel road." It will be observed that the provision is not limited to the mere costs or expenses of litigation, for it declares that the lands "shall be held responsible to the county, to protect the county against all loss or liability arising from any judicial proceeding affecting the assessments." This is a very broad provision, and includes far more than the costs of litigation, and these are expressly

named, and provision is explicitly made for reassessing the property to pay them. There are, therefore, two distinct causes for which a reassessment may be made, even if we confine the power to the single provision of the statute. If damages are assessed in a judicial proceeding for the taking of land or other property, or for injury to it, it would seem to be fully within the provision. We need not, however, at present decide what items of expense or cost an additional assessment may be made to pay, as it is sufficient now to decide that there are many of the items named in the order of the commissioners appealed from for which such an assessment may be levied.

We come now to the second question. It is our opinion that, as a petition had once been filed and as the matter was fully and peculiarly within the knowledge of the commissioners, they had a right to order an additional assessment, on their own motion.

The third question must be answered in favor of the appellees. The board of commissioners can not itself make the assessment, but notice must be given and the matter referred to the viewers or committee. *Gavin v. Board, etc., supra*. The board erred in making the additional assessment without giving notice and referring the matter as the law provides. For this reason the trial court did not err in holding the order appealed from to be erroneous. In so far as the board undertook to levy the assessment without notice and without the intervention of the viewers, it erred, and its order was rightly declared not effective. It may be that the proper course would have been to remand the case for further proceedings, rather than to order a dismissal, but as no question as to the character or form of the judgment was made, we shall not enter upon that subject.

Judgment affirmed.

Filed May 27, 1887.

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ON PETITION FOR A REHEARING.

ELLIOTT, J.—It is contended in the argument on the petition for a rehearing, that a gravel road when constructed becomes a county road, and, therefore, that it must be paid for by the county. But this argument will not bear investigation. All works in which the assistance of the right of eminent domain or the power of taxation is invoked are in their nature public, since these great attributes of sovereignty can be invoked only where the work is a public one. There may be public works and yet the public or governmental corporation not be required to pay the cost of making them. This is so in the case of streets, highways and sewers; but, although these things all belong to the public when completed, yet the cost of constructing them may be obtained by local assessments on the property benefited. *Heick v. Voight*, 110 Ind. 279, 284. The law upon this subject is now too firmly settled to be disturbed. It is evident, therefore, that the conclusion of counsel does not follow from their premises.

We did not decide, nor do we mean to decide, that payment can be exacted beyond the special benefits conferred upon the land. But we do hold, that to the extent of those benefits assessments may be made, and that making one assessment does not exhaust the power of the board. We base our conclusion upon the obvious purpose of the statute to compel the lands specially benefited to bear the burden, and not to suffer it to be borne by the county. There can, as we think, and as we have several times decided, be no doubt that the Legislature meant that the cost of constructing free gravel roads should be paid by the property specially benefited. If this is the intention of the Legislature, then it ought not to be rendered nugatory by holding that no machinery is provided for laying and collecting a second assessment; especially should this result be avoided where, as here, the express language of the statute fairly indicates what the machinery

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is. Nor is it in any sense judicial legislation to affirm that the Legislature intended that the proceedings in levying a second assessment should be substantially the same as those provided for the original. If courts can discover the legislative intention they must give it effect, and in their exploration they must bear in mind the fixed principle that where a principal power is conferred all necessary incidental powers are implied. We did no more in our former opinion than give effect to this settled principle.

It is not unknown to us, nor can it be to counsel, that the leading purpose of all our legislation upon the subject of free gravel roads is to compel the land benefited to pay the cost of constructing them. It is everywhere apparent that it was the intention that the property benefited should pay the expense, and that the county should not. With this knowledge so prominently and so plainly before us we can not adopt a line of decision which will utterly overthrow this great purpose. We must assert, as we have done, that this purpose can legally be effected, or we must hold that the Legislature has done a vain thing.

It was not necessary for us to discuss or decide specific questions which may possibly arise in the course of litigation respecting the power to levy a second assessment; all that it was necessary for us to decide was that such a power existed, and that the mode of its exercise is substantially the same as that provided for the original assessment. Beyond this our opinion does not go, nor does it assume to go further. It is possible that contingencies may arise in which the county can not escape some loss, but we need not now decide anything upon that subject; it is enough for the present to affirm that there is a general power to make and enforce, in the proper case, a second assessment.

Petition overruled, at costs of the appellees.

Filed Oct. 18, 1887.

No. 13,254.

WRIGHT, EXECUTRIX, ET AL. v. MANNS ET AL.

APPEAL.—Civil Actions.—Statute Construed.—Section 640, R. S. 1881, must be construed in connection with section 633, and appeals thereunder, as in all civil actions, must be perfected within one year from the time judgment is rendered.

SAME.—Time.—Computation of.—Under section 1280, R. S. 1881, in computing the year within which appeals may be taken, the day on which the judgment appealed from was rendered is to be excluded; therefore, where a judgment was rendered July 23d, 1885, and the transcript was filed July 23d, 1886, the appeal is in time.

SAME.—Death of Party.—Substitution of Administrator.—Decedents' Estates.—Where an action is commenced against a party, who dies while it is pending, and his administrator is substituted as defendant, the time within which an appeal may be taken is fixed by the civil code of practice, and not by section 2455, R. S. 1881, regulating appeals in matters affecting decedents' estates.

ATTACHMENT.—Delivery Bond.—Custodia Legis.—By the execution of a delivery bond, under section 924, R. S. 1881, attached property is not withdrawn from the custody of the law, but its keeping and care are removed from the sheriff and committed to the claimant until the sheriff may lawfully demand it to be sold on execution issued on the judgment for the sale thereof.

SAME.—Complaint on Delivery Bond.—Necessary Averments.—A complaint upon a delivery bond, executed by the claimant of attached property and his sureties, is bad if it fails to allege that after the rendition of judgment for the sale of the property a special execution had been issued thereon to the sheriff commanding him to sell the same, and that by virtue thereof he had demanded of the obligors the delivery of the property, or the payment of its appraised value, not exceeding the amount of the judgment and costs.

SAME.—Taking Personal Judgment Only.—Effect as to Attachment Proceedings.—The rendition of a personal judgment only against the defendant in an attachment suit is equivalent to a dismissal of the attachment proceedings, and a delivery bond executed therein ceases to be effective.

SAME.—Surrender of Indemnity.—Discharge of Sureties.—Judgment Nunc pro Tunc.—Where a personal judgment only is rendered against the attachment defendant, on the faith of which his sureties in the delivery bond surrender indemnity held by them, the subsequent entry, *nunc pro tunc*, of a judgment for the sale of the attached property will not affect them, their liability being at an end.

From the Harrison Circuit Court.

111	422
112	456
116	228
117	304
117	367

111	422
137	247

111	422
147	614

111	422
149	97
150	96

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B. P. Douglass, S. M. Stockslager, N. R. Peckinpugh and H. C. Hays, for appellants.

W. N. Tracewell and R. J. Tracewell, for appellees.

Howk, J.—This suit was commenced by appellees on the 28th day of August, 1883, against Samuel J. Wright, then in full life but since deceased, and Lewis W. Bowling, as defendants, in a complaint of two paragraphs. The cause was thereafter continued from term to term until the February term, 1885, of the court below. On the 26th day of February, 1885, the death of defendant Samuel J. Wright, testatè, having been suggested to the court, it was ordered that his executrix, Mary E. Wright, be substituted as defendant herein, in his stead. Afterwards, on July 23d, 1885, the issues in the cause were tried by the court, Hon. David W. LaFollette presiding as special judge, and a finding was made for the appellees, on the second paragraph of their complaint, in the sum of \$425.61; and over appellants' motion for a new trial, the court rendered judgment against them, on the day and year last named, upon such finding. On the same day the court made and rendered its finding and judgment, in favor of appellants and against appellees herein, upon the issues joined on the first paragraph of appellees' complaint herein.

Errors are assigned here by appellants, the defendants below, which call in question (1) the overruling of their demurrer to the second paragraph of appellees' complaint, and (2) the sustaining of appellees' demurrer to the second paragraph of appellants' answer herein.

On the 8th day of April, 1887, the appellees moved this court in writing to dismiss the appeal herein upon two grounds, namely: 1. Because the appeal was not perfected by the filing of the transcript of the record in the office of the clerk of this court within one year from the rendition of the judgment below; and 2. Because such appeal was not taken within the time limited by section 2455, R. S. 1881,

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the judgment below herein being connected with a decedent's estate. This motion to dismiss must first be considered and decided, because, if well taken, it will dispose of this appeal.

1. The judgment below herein, as will appear from our statement of this case, was rendered on the 23d day of July, 1885. On the 23d day of July, 1886, appellants filed in the clerk's office of this court a transcript of the record of this cause, with their assignment of errors thereon, as and for their appeal from the judgment below to this court, under the provisions of section 640, R. S. 1881. No time is specified in section 640, *supra*, within which an appeal to this court, in a civil action, must be taken in the manner prescribed therein. But in the recent case of *Johnson v. Stephenson*, 104 Ind. 368, it was held upon full consideration that such section 640 must be considered and construed in connection with section 633, R. S. 1881; that appeals to this court, in all civil actions, must be perfected by filing a transcript of the record in "the office of the clerk of the Supreme Court" within one year from the time of the rendition of the judgment appealed from; and that if the transcript be not so filed within the year, the appeal must be dismissed. *Harshman v. Armstrong*, 43 Ind. 126; *Jenkins v. Corwin*, 55 Ind. 21; *Anderson v. Mitchell*, 58 Ind. 592.

From what we have said it is manifest, we think, that the question we are now considering, whether or not the appeal in this action was perfected within one year from the rendition of the judgment appealed from herein, depends for its proper decision upon the rule in this State for the computation of time. If the day on which the judgment was rendered is to be included in the year within which an appeal to this court in a civil action must be perfected, it is clear that the appeal herein was not perfected within one year; but if that day is to be excluded in computing such year, it is equally clear that the appeal in this case was perfected within one year from the rendition of the judgment herein,

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and the motion of appellees to dismiss this appeal, for the first cause assigned therein, is not well taken. Our civil code prescribes the rule in this State for the computation of time, in all civil actions, as follows: "The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded." Section 1280, R. S. 1881. The section quoted and cited is a literal re-enactment of section 787, of the civil code of 1852, which took effect May 6th, 1853; and, therefore, the rule declared therein for the computation of time, in all civil actions, has been in force continuously for more than thirty-four years. This statutory rule for the computation of time, in civil actions, since its first enactment, has been recognized and acted upon repeatedly in our decisions. *Noble v. Murphy*, 27 Ind. 502; *State, ex rel., v. Thorn*, 28 Ind. 306; *Byers v. Hickman*, 36 Ind. 359.

2. As to the second ground stated in appellees' motion for the dismissal of this appeal, it will suffice to say that the precise question thereby presented was fully considered and decided by this court adversely to the motion of appellees herein in *Heller v. Clark*, 103 Ind. 591. See, also, the cases there cited.

Our conclusion is that appellees' motion to dismiss the appeal herein is not well taken on either ground stated therein, and must be overruled.

We come now to the consideration of the errors of which complaint is made here by appellants' counsel. It is first insisted on appellants' behalf that the trial court erred in overruling their demurrer to the second paragraph of appellees' complaint. In this paragraph appellees declared upon a written undertaking, taken and approved by the sheriff of Harrison county on the 14th day of August, 1879, of which the following, omitting the obligors' signatures, is a copy:

"We, Isaac Urbanski, Samuel J. Wright and Lewis W. Bowling, are held and firmly bound unto Louis Manns and

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John Manns, partners, under the firm name of Manns, Bro. & Co., to the effect following: That whereas, at the suit of said Manns, Bro. & Co., the sheriff of Harrison county, Indiana, did, on the 12th day of August, 1879, attach and take into possession certain of the personal property of said Isaac Urbanski, which is correctly enumerated and described in the schedule of said sheriff attached to the writ of attachment in said case issued; and whereas, the said sheriff has redelivered said personal property to said Isaac Urbanski; now, the above bound Isaac Urbanski, Samuel J. Wright and Lewis W. Bowling undertake that the said Isaac Urbanski shall properly keep and take care of said property, and shall, on demand, deliver to said sheriff of Harrison county the personal property so attached by him and described in said schedule above referred to, or that failing so to do they will pay the full appraised value of said property, to the extent of any judgment which may be recovered against said Isaac Urbanski by said Manns, Bro. & Co., and any costs which may be taxed against him in said proceeding. Witness our hands and seals this 14th day of August, 1879."

In the second paragraph of their complaint appellees alleged breaches of the foregoing undertaking, as follows:

1st. That neither of the defendants therein had caused to be delivered to the sheriff of Harrison county any part of said attached property, but, on the contrary, had failed, refused and neglected so to do, and appellees averred that such property was of the value of \$550.

2d. That neither of such defendants, nor any other person, had paid, or caused to be paid, any part of appellees' judgment against Isaac Urbanski, but the same remained due and wholly unpaid.

3d. That said Isaac Urbanski did not properly keep and take care of said attached property in such undertaking mentioned, but, on the contrary, immediately after the execution of such undertaking he removed such property without the

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jurisdiction of the court below, and without the boundaries of the State of Indiana, and that neither he nor any part of said property had been within the limits of Harrison county since March 1st, 1880. Wherefore, etc.

It is claimed on behalf of appellants that this paragraph of complaint was clearly bad on their demurrer thereto, for the want of averments therein that after appellees had procured the correction of their personal judgment against the defendant Urbanski by the entry of a *nunc pro tunc* order for the sale of the attached property, they had caused a special execution to be issued thereon to the sheriff of Harrison county, commanding him to sell such attached property, or so much thereof as might be necessary, to pay their said judgment; and that the sheriff of such county, by virtue of such special execution or otherwise, had demanded of Urbanski or his sureties in such undertaking, before the commencement of this suit, either that they deliver to such sheriff said attached property or that, failing so to do, they pay to such sheriff the full appraised value of such attached property to the extent of appellees' aforesaid judgment against said Urbanski.

We are of opinion that these objections of appellants to the sufficiency of the facts stated in the second paragraph of appellees' complaint herein are well taken, and that, for the want of such averments as those stated, the demurrer to such paragraph of complaint ought to have been sustained. The undertaking sued upon in such second paragraph was executed under, and in conformity with, the provisions of section 168 of the civil code of 1852, which section was literally reenacted as section 209 of "An act concerning proceedings in civil cases," approved April 7th, 1881, and is section 924, R. S. 1881.

In such section it is provided as follows: "The defendant or other person having possession of property attached, may have the same or any part thereof delivered to him, by executing and delivering to the sheriff a written undertaking,

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with surety to be approved by the sheriff, payable to the plaintiff, to the effect that such property shall be properly kept and taken care of, and shall be delivered to the sheriff on demand, or so much thereof as may be required to be sold on execution to satisfy any judgment which may be recovered against him in the action, or that he will pay the appraised value of the property, not exceeding the amount of the judgment and costs."

In *Dunn v. Crocker*, 22 Ind. 324, it was held by this court, in construing the provisions of the section quoted, that the undertaking therein provided for is "in the nature of a delivery bond, which does not release the property from the attachment, nor from an order of sale in the judgment." By the execution of such an undertaking the attached property is not withdrawn from the custody of the law, but the proper keeping and care of such property is thereby removed from the sheriff and committed to the claimant, until such time as the sheriff may lawfully demand the delivery of the property back to him to be sold on the execution issued on the judgment for the sale of the attached property. *Lusk v. Ramsay*, 3 Munf. 417; *Doremus v. Walker*, 8 Ala. 194; *Hagan v. Lucas*, 10 Peters, 400.

From the provisions of the section quoted, and the terms of the undertaking declared upon in the second paragraph of the complaint herein, it would seem to be clear that until judgment had been rendered in appellees' suit against Urbanski for the sale of the property attached therein, and until a special execution issued on such judgment had come into the hands of the sheriff of Harrison county, commanding him to sell such attached property, such sheriff would not be lawfully authorized to demand of Urbanski and his sureties in such undertaking either the delivery back to him of such property, or the payment of its appraised value, not exceeding the amount of such judgment and costs. This was decided, substantially, by this court in *Gass v. Williams*,

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46 Ind. 253, and in *Lowry v. McGee*, 75 Ind. 508. See, also, *Sannes v. Ross*, 105 Ind. 558.

Under all the canons of good pleading, it would seem to be equally clear that a complaint upon such an undertaking, which fails to allege, *inter alia*, that after the rendition of judgment for the sale of the attached property, a special execution had been duly issued on such judgment to the sheriff of the proper county commanding him to sell such property, or so much thereof as might be necessary to pay such judgment, and that such sheriff, by virtue of such execution, had demanded of the obligors in such undertaking the delivery to him of such attached property, or the payment of its appraised value not exceeding the amount of such judgment and costs, would be bad on demurrer thereto for the want of sufficient facts. The court erred, we think, in overruling the demurrer to the second paragraph of appellees' complaint.

Appellants' counsel also insist that the trial court erred in sustaining the demurrer to the second paragraph of their answer to the second paragraph of appellees' complaint herein. In this paragraph of answer, appellants admitted that Samuel J. Wright, then in full life but since deceased, and appellant Bowling executed the written undertaking mentioned in the attachment proceedings by appellees herein against Isaac Urbanski, as sureties for the delivery to Urbanski of the attached property mentioned in the second paragraph of complaint herein, but they averred that, prior to the execution of such undertaking, in consideration that said Samuel J. Wright and Lewis W. Bowling would execute such undertaking as his sureties therein, Isaac Urbanski endorsed and transferred to said Samuel J. Wright, as an indemnity to such sureties against any loss they might sustain by reason of their suretyship, a negotiable promissory note held by him on one David Urbanski, a good and solvent person, for the sum of \$500, which was more than sufficient to fully indemnify them against any loss they might sustain by rea-

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son of their suretyship, which endorsement of such note was made before its maturity; that such other and further proceedings were afterwards had by appellees, as set forth in the second paragraph of their complaint herein, that they recovered the judgment mentioned therein, against Isaac Urbanski, being a personal judgment only, which judgment was duly read in open court, and approved and signed by the court, and appellees' attorneys were present within the bar when such judgment was read and approved by the court; that afterwards, such sureties examined the record in such proceeding and were advised by counsel that no action could be enforced against them upon their written undertaking on the judgment so rendered; that after retaining such note of David Urbanski for nearly one year from the date of said judgment, and no proceedings having been taken against such sureties for the enforcement of said judgment, on demand of Isaac Urbanski, and on the faith of the personal judgment taken against said Isaac, as the same appeared of record on the order-book of the Harrison Circuit Court, they in good faith surrendered to Isaac Urbanski said negotiable note, which they held from him on David Urbanski as aforesaid; that afterwards, as averred in the second paragraph of appellees' complaint herein, by notice and motion in the Harrison Circuit Court, appellees procured such personal judgment to be amended by the entry of a *nunc pro tunc* order for the sale of such attached property; and appellants said that, by reason of appellees' failure to have their judgment against Isaac Urbanski so entered in the first instance as to order the sale of such attached property, the sureties in such undertaking were induced to surrender their said indemnity, and appellees ought not to have judgment against appellants on such second paragraph of complaint.

We are of opinion, that if the facts stated in this paragraph of answer be true—and as they are well pleaded their truth is admitted as the case is here presented—they constitute a

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full and complete bar both in law and equity to the cause of action set forth by appellees in the second paragraph of their complaint herein. It is settled by our decisions that, where ancillary proceedings in attachment have been instituted in support of a pending cause of action, and personal property of the defendant has been seized by the sheriff under such proceedings, if the trial of such cause result in a personal judgment only against such defendant, without any special judgment or order of the court for the sale of such attached property, the taking of such personal judgment only, of itself, is an abandonment by the plaintiff of his attachment proceedings, and an undertaking or bond for the delivery of such attached property falls with the other proceedings and ceases to have any legal effect or binding force. *Gass v. Williams, supra*; *Lowry v. McGee, supra*; *Smith v. Scott*, 86 Ind. 346.

In the case last cited, which was a suit upon an undertaking similar to the one declared upon by appellees in the second paragraph of their complaint herein, it was held by this court that the rendition of a personal judgment only against the defendant in an attachment suit is equivalent to a dismissal of the proceedings in attachment; and that, unless judgment be rendered for the sale of the attached property in the action wherein such undertaking was executed, there is no liability on such undertaking. "So it was held, upon full consideration, in *Gass v. Williams*, 46 Ind. 253."

Of course, if the court has rendered the proper judgment for the sale of the attached property, but, through the misprision of the clerk, such judgment has not been entered, the record may be amended by a *nunc pro tunc* order and entry, if there be anything to amend by, and if such *nunc pro tunc* judgment or order will not injuriously affect the rights of third persons. In *Urbanski v. Manns*, 87 Ind. 585, the *nunc pro tunc* judgment and order for the sale of the attached property mentioned in the second paragraph of appellees'

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complaint herein were considered to some extent by this court. After quoting section 66 of Freeman on Judgments, it is there said: "These appellants, Wright and Bowling, were bound to take notice of the personal judgment that was entered of record against Urbanski, but they were not required to take notice of the memoranda of the judge of the findings and rendition of the judgment by the court, upon which the entered judgment might be corrected; and whatever rights they might have acquired between the original entering of the judgment and its correction *nunc pro tunc*, in making such order, it would have been proper to have expressly saved to them, * * so as to allow them to be made available in any subsequent proceeding. * * * We think that all their rights can be fully protected in any legitimate subsequent proceedings, without reversing the *nunc pro tunc* judgment against Urbanski."

The case in hand is a "legitimate subsequent proceeding," and in and by the second paragraph of their answer herein appellants have clearly stated the legal and equitable defences which they acquired between the rendition of appellees' personal judgment only against Urbanski, on the 1st day of March, 1880, and the subsequent entry, *nunc pro tunc*, of the judgment or order for the sale of the attached property on the 6th day of June, 1881, to appellees' suit herein against the sureties of Urbanski in the undertaking given by him in appellees' attachment proceedings for the delivery of the attached property.

We are clearly of opinion that the facts stated by appellants in the second paragraph of their answer constitute a full and complete bar to the cause of action which appellees attempted to state in the second paragraph of their complaint herein; and that it was error, therefore, to sustain their demurrer to such second paragraph of appellants' answer.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrer to the

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second paragraph of answer, and to sustain the demurrer to the second paragraph of complaint, and for further proceedings not inconsistent with this opinion.

Filed May 24, 1887; petition for a rehearing overruled Sept. 27, 1887.

 No. 12,767.

DICKERSON, ADMINISTRATOR, v. DAVIS ET AL.

111	483
156	286

111	483
158	100

JUDGMENT.—*By Default Against Insane Person.*—*Suit to Set Aside.*—*Mistake.*—*Guardian and Ward.*—*Promissory Note.*—*Innocent Holder.*—*Fraud.*—*Consideration.*—Where a judgment by default is taken against a person of unsound mind, after due service of process, by a good-faith holder of a commercial note, which had been obtained by the original payee from the defendant by fraud and without consideration, it may be set aside under section 396, R. S. 1881, at the suit of the guardian or administrator, and the latter let in to defend, by showing that the defendant was of unsound mind when he executed the note, and that it was without consideration, although the plaintiff practiced no fraud in obtaining the judgment and had no knowledge of the defendant's insanity, which had not been judicially declared.

SAME.—*Collateral Proceeding in Aid of Execution.*—*Will not Defeat Right to Relief from Judgment.*—The right to obtain relief from a judgment under section 396 can not be defeated by the plaintiff instituting proceedings in aid of an execution, to enforce the judgment from which the defendant, by appropriate proceedings then pending, is seeking to be relieved.

SAME.—*Sale.*—*Redemption by Guardian.*—The fact that the guardian of an insane person, against whom a judgment has been wrongfully obtained, to save his ward's property, redeems from a sale thereof under proceedings to enforce the judgment instituted during the pendency of a complaint to set it aside, is not a bar to relief under section 396.

SAME.—*Wrongful Judgment.*—*Enforcement.*—*Effect of Setting Aside.*—One who proceeds with the enforcement of a judgment wrongfully obtained, with knowledge that proceedings have been instituted by or on behalf of the defendant to be relieved therefrom, assumes the risk that, if the judgment be set aside, he will be compelled to restore to his adversary whatever has been so coerced from him.

From the Boone Circuit Court.

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Dickerson, Administrator, v. Davis *et al.*

J. A. Abbott and *I. M. Kelsey*, for appellant.

C. M. Zion, for appellees.

MITCHELL, J.—Lewis recovered a judgment by default in the Boone Circuit Court against Garrett McClain for \$82.67. The judgment was afterwards assigned to Isaac T. Davis. Subsequently, McClain was declared to be a person of unsound mind, and his guardian, in that behalf appointed, commenced this proceeding to set aside the default. He charged, in the complaint filed for that purpose, that his ward was a person of unsound mind, and that the note on which the judgment had been rendered had been obtained from Garrett McClain by fraud while he was of unsound mind, without any consideration.

This complaint was held insufficient on demurrer. The guardian appealed to this court, and the ruling and judgment of the court below were reversed. *McClain v. Davis*, 77 Ind. 419.

When the case was returned to the court below, Garrett McClain having died meanwhile, Dickerson, as administrator of his estate, filed an amended and supplemental complaint. This complaint put forward substantially the same facts in respect to the note and the unsoundness of mind of the maker as were set forth in the original. In addition to these facts, it was also alleged that, pending the appeal, certain real estate owned by the intestate had been sold to satisfy the judgment in question, and that the guardian of the intestate had been compelled to pay to the appellee Davis, the full amount of the judgment, interest and costs in order to redeem the insane ward's land from the sale so made. The prayer was that the default and judgment should be set aside, and that the plaintiff, as administrator, might recover the amount which the guardian had been compelled to pay in order to redeem from the sale.

Upon issues duly made the court heard the evidence and found the facts specially. The finding is, in substance, that the note in question was executed without consideration,

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payable at a bank in this State, and that the maker was, at the time of its execution, and so continued until his death, a person of unsound mind. It is found that a judgment was taken on this note by default on the 28th day of November, 1877. The owner of the judgment was found to have purchased the note in good faith, for a valuable consideration, before its maturity. After judgment had been taken on the note, in the manner alleged in the complaint, the appellee Davis, being the owner of the judgment, instituted an action in the Boone Circuit Court to set aside an alleged fraudulent conveyance of certain real estate from Garrett McClain to his wife. The court found that the guardian of Garrett McClain set up as a defence to the action so instituted substantially the same facts in reference to the execution of the note and the unsoundness of mind of Garrett McClain as are set up in the complaint in this case. He also alleged in his answer, that he had instituted and then had pending a proceeding to set aside the judgment which the appellee was seeking to enforce. Such proceedings were had in that behalf as that, upon a trial of the issues therein joined, there was a finding and judgment for the plaintiff, and an order that the conveyance be set aside and the land subjected to sale to satisfy the judgment. The land was accordingly sold, the appellee herein bidding it in for the full amount of the judgment, interest and costs.

It is found by the court that the guardian of the judgment defendant, within the year for redemption, redeemed the land by paying the amount of the bid and interest thereon.

Upon the facts so found the court stated as its conclusion that the appellant was not entitled to have the judgment set aside, or to any other relief. Judgment was given accordingly.

The case presented is one in which a judgment by default was taken against a person of unsound mind, presumably after due service of process, by a good-faith holder of a commercial note which had been obtained by fraud and with-

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out consideration by the original payee. No fraud or unfairness in obtaining the judgment is either alleged or found, nor does it appear that the holder of the note had any knowledge or reason to suspect that the maker was insane at the time the judgment was taken.

The defendant not having been judicially declared to be a person of unsound mind at the time the contract was made and the judgment taken, the question is, will the default be set aside as against a good-faith purchaser of the note, and the guardian or administrator let in to defend, by simply showing that his ward was of unsound mind when the note was executed and the judgment taken, and that the note was without consideration?

The proceeding was commenced under section 396, R. S. 1881. This section provides, among other things, that a party may be relieved from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, on complaint or motion filed within two years. That there was a meritorious defence to the action is clear. The note was obtained by fraud from a person of unsound mind, without any consideration. That the holder of the note and judgment plaintiff was an endorsee for value, without notice, does not alter the case. The maker of the note, being at the time of unsound mind, had no capacity to bind himself by contract. A purchaser of commercial paper is affected with notice of the *status* or disability of the maker. That the note was purchased in good faith before maturity presents no obstacle to a disaffirmance in case the maker had not the mental capacity to bind himself by contract, unless the note was originally taken in good faith upon a consideration which was reasonably necessary for, or actually beneficial to, the maker. *Physio-Medical College v. Wilkinson*, 108 Ind. 314; *Baxter v. Earl of Portsmouth*, 5 Barn. & Cres. 170; *Dane v. Kirkwall*, 8 C. & P. 679; *Seaver v. Phelps*, 11 Pick. 304; Buswell Insanity, section 290.

The protection of persons who are so unfortunate as to be

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bereft of reason and incapable of managing their own estates, is of higher obligation, and an object more to be cherished by the courts, than is the protection of holders of commercial paper, however innocent they may be. *McClain v. Davis, supra*; *Moore v. Hershey*, 90 Pa. St. 196; *Wirebach v. First Nat'l Bank*, 97 Pa. St. 543 (39 Am. R. 821); *Van Patton v. Beals*, 46 Iowa, 62; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; 1 Daniel Neg. Inst., sections 209, 210; *Hull v. Louth*, 109 Ind. 315; Buswell Insanity, sections 300, 301.

“There can be no contract unless there be a meeting of minds; and there can be no meeting of minds if the one party has no mind which can meet the mind of the other.” 1 Parsons Notes and Bills, 149.

The fact that the maker of the note was of unsound mind at the time judgment was taken against him by default, presented such an excuse for his non-appearance as entitled his guardian to have the default set aside under the provisions of section 396. This was in effect determined by the decision given on the first appeal. Where an inequitable and unjust judgment has been taken against a party by default, it is the duty of the court to relieve him from the judgment, upon complaint or motion filed within two years, provided it be shown that he has a meritorious defence which, without inexcusable neglect on his part, he was prevented from making.

Courts have power to protect persons from the effect of judgments, who have not been served with process, or who without fault have been deprived of an opportunity for a hearing. When it is admitted or established that a defendant was insane when process was served upon him, and judgment taken by default, these facts carry all the other necessary consequences with them. It follows that the judgment in such a case was taken by mistake and without the defendant's fault. *Leach v. Marsh*, 47 Maine, 548.

No doubt but that equity would furnish relief by an original bill after two years had expired. In such a case, it

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might be necessary, however, in order that relief should be afforded, that the injured party go further and show that the judgment plaintiff had been guilty of some fraud or unfairness in taking the judgment.

After a judgment has stood beyond the statutory period within which it may be reviewed, set aside, or opened up, relief can only be had by appealing to the equity or chancery jurisdiction of the court. We need not consider the principles applicable to such a case. *Johnson v. Pomeroy*, 31 Ohio St. 247; *Stigers v. Brent*, 50 Md. 214 (33 Am. R. 317; 10 Cent. L. J. 473); *King v. Robinson*, 33 Maine, 114.

Having arrived at the conclusion that, upon the facts found as they existed when the proceeding to set aside the judgment was originally commenced, the defendant therein was clearly entitled to be relieved, it remains to be considered whether the court properly denied relief on account of what has occurred since.

Did the holder of the judgment by his proceeding to set aside the transfer of real estate from Garrett McClain to his wife, and the judgment therein obtained, and by selling the defendant's real estate, and by that means inducing the guardian to redeem from the sale, thereby bring about such a condition of affairs, pending the proceedings to set aside the default, as now precludes the court from affording relief from the judgment? Upon well settled principles this inquiry must be answered in the negative. What has happened since the rendition of the judgment which defeats a clear statutory right to relief? It is claimed that there has been an adjudication of the validity of the judgment, and that there has been a voluntary payment of the debt. It is found that, pending the proceeding to set aside the default, the appellee instituted a proceeding in aid of an execution, issued upon the judgment, to subject certain real estate to sale in order to satisfy the judgment now in question. To this proceeding the guardian answered that his ward was a person of unsound mind at the time the judgment was ren-

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dered, that there was a meritorious defence to the action on the note, and that a proceeding was then pending to set aside the judgment which the plaintiff was then seeking to enforce. Over this answer the court gave judgment that the conveyance should be set aside, and that the ward's land be subjected to sale. The answer filed by the guardian was in the nature of a dilatory plea. It was in effect an appeal to the court to stay proceedings until the pending application to set aside the default should be determined. While the judgment, in aid of the enforcement of which the proceeding to subject the ward's land was being prosecuted, remained in force, it was not competent in a collateral proceeding to draw its validity in question by an answer that there was a meritorious defence to the original action, and that the judgment had been taken by mistake or through the excusable neglect of the defendant. The judgment of the court setting aside the conveyance and subjecting the land did not, and could not, involve the merits of the pending application to set aside the default. *Proctor v. Cole*, 104 Ind. 373; *Boggs v. Clark*, 37 Cal. 236; Freeman Judg., section 321.

Perhaps the court should have stayed the proceeding to set aside the conveyance until the pending case had been determined. Its judgment, however, in the collateral proceeding did not estop the guardian from carrying on the pending proceeding to obtain relief under the statute.

The right to obtain relief from a judgment under section 396 can not be defeated by the plaintiff instituting proceedings, in aid of an execution, to enforce the judgment from which the defendant had already asked to be relieved, and for which purpose appropriate proceedings were then pending.

Where a party's hands have been tied by a judgment wrongfully obtained against him, he can not be prevented from obtaining relief by other complications which the holder of the judgment may have forced upon him, without his consent, during his struggle to free himself from the original wrong. One who proceeds with the enforcement of a judg-

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ment so obtained, with knowledge that proceedings have been instituted by or on behalf of the defendant to be relieved therefrom, takes the chance that, if the judgment is reversed or set aside, he will be compelled to restore his adversary to the situation he was in before the erroneous judgment was rendered—that is to say, whatever has been coerced from the defendant in the way of enforcing a judgment while proceedings to set it aside are pending, must be restored in the event the judgment should finally be for the defendant. A party will not be permitted to hold on to an advantage obtained by means of an inequitable and wrongful judgment after the judgment has been set aside or reversed. *Maghee v. Collins*, 27 Ind. 83; *Argenti v. City of San Francisco*, 30 Cal. 458; *Raun v. Reynolds*, 18 Cal. 275; Freeman Judgments, section 481.

The fact that the guardian redeemed his ward's land from the execution sale presents no obstacle against the right of the administrator to have the default set aside. Every step which the appellee took was taken with knowledge that the judgment which he was enforcing was being challenged as wrongful. He is not in a position to say that the redemption by the guardian of the ward's property, which had been sold to satisfy a judgment which ought never to have been rendered, was a voluntary payment. What could the guardian do after the sale except to redeem, or take the chance that the Supreme Court might hold that his ward was without remedy? He had instituted proceedings to set the judgment aside. When the appellee instituted his proceedings in aid of the execution, he had, without success, appealed to the court to delay until the motion to set aside the default could be determined. Over all, the appellee proceeded to sell his ward's homestead.

We can not understand how it can be maintained that, because the guardian did that which every prudent man would have done under like circumstances, it is now to be said the

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payment was voluntary, and a bar to obtaining relief from the judgment.

Upon the facts found our conclusion is, that the judgment by default against Garrett McClain should be set aside, so far as to allow the administrator of his estate to present whatever defence there may be to the note sued on, and that the money paid to redeem be brought into the Boone Circuit Court to await the final order and determination of the pending suit.

Judgment reversed, with costs, with direction to the court below to restate its conclusions of law according to this opinion, and for further proceedings.

Filed May 24, 1887; petition to modify mandate overruled Sept. 21, 1887.

111	441
115	502
111	441
150	392

 No. 13,873.

BROWN v. THE STATE.

CRIMINAL LAW.—*Instructions.*—*Record.*—*Bill of Exceptions.*—*Supreme Court.*

—Instructions which are copied into the transcript by the clerk, but not brought into the record by a bill of exceptions or by a special order of the court, will not be considered on appeal.

SAME.—*Manslaughter.*—*Assault and Battery with Intent to Commit.*—*Verdict.*—

Failure to Specify whether Voluntary or Involuntary.—In a prosecution for assault and battery with intent to commit manslaughter, the verdict is not vitiated, or the substantial rights of the defendant prejudiced, by a failure to specify therein whether the intent was to commit voluntary or involuntary manslaughter.

From the Switzerland Circuit Court.

J. A. Works and *L. O. Schroeder*, for appellant.

L. T. Michener, Attorney General, *M. R. Sulzer*, Prosecuting Attorney, and *J. H. Gillett*, for the State.

ELLIOTT, J.—The appellant was convicted of assault and

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battery with intent to commit manslaughter, and from that judgment prosecutes this appeal.

What purports to be the instructions of the court are copied by the clerk, but they are not brought into the record by a bill of exceptions, nor by special order of the court. We can not, therefore, regard them as properly before us, for instructions can not be made part of the record by the act of the clerk in copying them. *Hollingsworth v. State*, ante, p. 289; *Leverich v. State*, 105 Ind. 277.

It is contended by the appellant's counsel that the judgment should be reversed because the verdict does not state whether the intent was to commit voluntary or involuntary manslaughter. We do not think that any question as to the sufficiency of the verdict is presented by the record. We incline to the opinion that such a question as that here sought to be brought before us can not be presented by a motion for a new trial. *Marcus v. State*, 26 Ind. 101. But if it be conceded that the question is properly presented, it will not avail the appellant, for the failure to specify the degree or kind of manslaughter which the accused intended to commit does not vitiate the verdict. *Powers v. State*, 87 Ind. 144. It is evident that the failure to more specifically describe the offence could not have prejudiced the material rights of the appellant, for, whether the manslaughter be voluntary or involuntary, the punishment is the same. *Powers v. State*, supra; *Keeling v. State*, 107 Ind. 563.

It is now well settled that no judgment, either in a criminal or civil case, will be reversed for an error which does not prejudice the substantial rights of the appellant.

There is evidence fully sustaining the verdict, and we can not disturb it.

Judgment affirmed.

Filed June 30, 1887; petition for a rehearing overruled Sept. 21, 1887.

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No. 11,341.

111	443
159	344

HOAGLAND ·ET AL. v. THE NEW YORK, CHICAGO AND
ST. LOUIS RAILWAY COMPANY.

LEASE.—*Implied Covenant for Quiet Enjoyment.*—*Landlord and Tenant.*—

A covenant for quiet enjoyment is implied in every mutual contract for leasing land, by whatever form of words the agreement is made.

SAME.—*State Canal.*—*Lease of Use of Surplus Water.*—*Quiet Enjoyment.*—Un-

der a lease by the State of the use of so much of the surplus water, not required for navigation, of the Wabash and Erie Canal as would be sufficient to propel certain machinery in the lessee's mills, the implied covenant for quiet enjoyment was such that, so long as the canal was used for purposes of navigation, and while there was, during that period, a surplus of water, the lessor agreed to do no acts which would interrupt or deprive the lessee of its enjoyment.

SAME.—*Abandonment of Canal.*—*Appropriation to Other Uses.*—*Obstruction of*

Channel.—The contract in such case did not impose upon the lessor or its grantees any obligation to keep the canal in repair, or to maintain it in such a condition that a surplus of water would be available, or to supply the lessee with any water, whatever, but the latter took the lease subject to all the vicissitudes which might attend a public work of that character, and to the right of the lessor or its grantees to abandon the canal for purposes of navigation and to appropriate it to other uses, including the construction of a railroad on the line occupied by it, thereby filling up the channel.

From the Allen Superior Court.

L. M. Ninde, for appellants.

R. C. Bell, for appellee.

MITCHELL, J.—Pliny Hoagland and Christian Tresselt sued the New York, Chicago and St. Louis Railway Company to recover damages for obstructing the flow of water to their mills.

The facts are, briefly, as follows: On the 29th day of November, 1842, the State of Indiana, having partially completed the Wabash and Erie Canal, made a lease of lots 24 and 25, in the original plat of the city of Fort Wayne, to Allen Hamilton and Jesse L. Williams, and in the same instrument granted them the use of so much of the surplus water

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of the Wabash and Erie Canal, not required for the purposes of navigation, as would be sufficient to propel three run of four and one-half feet millstones, for a term of thirty years. The lease contained a stipulation that it might be renewed, upon certain terms, for an additional term of thirty years. The lessees took possession under the first lease, and erected a flouring mill, which, with the appurtenances and other improvements made on the leased premises, is alleged to be of the value of forty thousand dollars. Prior to the expiration of the first lease the State transferred its interest in the canal and appurtenances to a corporation created by an act of the General Assembly, known as the Board of Trustees of the Wabash and Erie Canal. Pursuant to the provisions contained in the original lease, the board of trustees, on the 8th day of May, 1872, granted a new lease of substantially the same rights for the additional term of thirty years. Hoagland and Tresselt are the owners of this last lease by assignment. Neither of the leases contained any covenant to repair, nor was there any covenant for quiet enjoyment or for a continuation of the right to use the surplus water from the canal, except such as would be implied by law. The right of the lessees to use water from the canal was made expressly subject to the right of the lessors to draw off the water, either wholly or partially, for the purpose of preventing or repairing breaks, or removing obstructions from the canal. It was also stipulated that if the water should be drawn off for any of the purposes above named, or if the supply became inadequate, and the lessees should be wholly or partially deprived of water, a corresponding reduction should be made in the rent. Under these leases the original lessees and their assigns continued to draw and use the surplus water from the canal until about the year 1882, when, it is alleged, the New York, Chicago and St. Louis Railway Company, having, so far as appears, lawfully acquired the equitable title to the canal and its appurtenances at the point where it traverses the city of Fort Wayne, and for some distance beyond, pro-

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ceeded to construct its roadway and track on the line previously occupied by the canal, thereby filling up the channel of the canal, and causing the water to be obstructed to such an extent as practically to deprive the mill-owners of their power.

The railway company acquired its right to the canal in the manner following: The State, having become largely indebted through the construction of a system of public improvements which it had undertaken, transferred its interest in the canal to the board of trustees of the Wabash and Erie Canal on the 30th day of July, 1847. The board of trustees took the property in trust for the payment, out of the revenues to be derived from its operation, of certain bonds and interest coupons, which were accepted by creditors of the State in lieu of obligations previously owing to them by the latter. The revenues proved insufficient to meet the maturing obligations thus accepted, and the lien of the bondholders, which antedated the leases under which the mill-owners' rights accrued, was foreclosed. The canal and its appurtenances were sold under a decree of foreclosure. The railroad company acquired its right through mesne conveyances under this decree, the title having been conveyed to one Howard for its use. Prior to the acquisition of title by or for the use of the railroad company the canal had become dilapidated, and had fallen into disuse and decay, and had long before that been abandoned as a highway of commerce, or for any public or commercial purpose. The mill-owners had, however, regularly paid to the successive owners, prior to the railway company, the rents stipulated in the lease.

Upon the foregoing facts, the question arises, whether or not the railway company is liable to the owners of the mill for filling up the canal and obstructing the flow of water to their wheels.

The theory upon which the appellants' case proceeds is that, although the State and its grantees may not have incurred an affirmative obligation to keep the canal in repair, or to sup-

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ply the lessees with water, the law, nevertheless, by implication, annexed to the lease a covenant for quiet enjoyment. The law having imported such a covenant into the lease, it is contended that the entering upon and filling up the bed of the canal, thus cutting off the flow of water upon the lessees' wheels, was an invasion of their right and a disturbance of their possession by the lessor, and, hence, such an act of aggression and wrong as renders the railway company liable for the resulting injury to their property.

That a covenant for quiet enjoyment, and that the landlord agrees to do no such acts as will destroy the beneficial use of the leased premises, is implied in every mutual contract for leasing land, by whatever form of words the agreement is made, is now too well settled to be doubted or shaken. *Avery v. Dougherty*, 102 Ind. 443 (52 Am. R. 680); *Smith v. Dodds*, 35 Ind. 452; *Wade v. Halligan*, 16 Ill. 507; *Streeter v. Streeter*, 43 Ill. 155; *Mack v. Patchin*, 42 N. Y. 167 (1 Am. R. 506); *Maule v. Ashmead*, 20 Pa. St. 482; *Eldred v. Leahy*, 31 Wis. 546; Wood Landlord and Tenant, 564.

The more serious question usually encountered, is that which relates to the measure of the lessee's damages when such a covenant is broken. Ordinarily, if the landlord takes possession or obstructs the tenant in the enjoyment of any material part of the demised premises, without the latter's consent, that will constitute in law an eviction of the tenant, and will operate to release him from any further liability to pay rent, even for so much of the leasehold as he may continue to occupy. *Mack v. Patchin*, *supra*; *Bentley v. Sill*, 35 Ill. 414; *Smith v. Wise*, 58 Ill. 141.

The measure of damages for the breach of a covenant for quiet enjoyment depends largely upon the nature of the estate or title granted, and the character of the landlord's default. The covenant always relates to, and never extends beyond, the interest, estate, or privilege granted. It is restrained and limited to the estate demised. Rawle Covenants (4th ed.), 199, 524.

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The legal implication of the covenant is, that the landlord has an adequate title to the estate created by the lease, and that he will permit the tenant to enjoy, without disturbance or interruption, the interest, title or privilege demised, subject to all such rights as are expressly, or by necessary implication, reserved to the lessor. It becomes important, therefore, to inquire into the nature of the right or privilege granted to the lessees by the lease in question; and to ascertain the rights expressly or impliedly reserved to the lessor. The subject-matter of the lease was so much of the surplus water not required for navigation, to be taken by the lessees from the Wabash and Erie Canal, as should be adequate to propel a designated amount of machinery in their mills. The decisions of this and other courts establish beyond question, that the lessor, by the terms of the lease in question, assumed no obligation to maintain the canal in repair, or to keep it in such a condition as that a surplus of water above that needed for navigation should be available. The lease imposed no obligation whatever to furnish or supply the lessees with water. It did nothing more than confer upon them the privilege of using the surplus water whenever and so long as there should be a surplus above that employed in navigation. Indeed, it is apparent from the face of the lease, that both parties contemplated that the supply of water might become partially or wholly inadequate. In the event of such a contingency, the lease made provision for a corresponding reduction or suspension of rent. Both parties recognized the fact that the canal was constructed for the purpose of commerce. It was built for purposes of navigation, and intended to be used primarily as a line of intercommunication. Neither party, at the time of the lease, apparently contemplated the abandonment of the canal for the purposes for which it was constructed. Hence, no provision was made restricting the lessor from using all the water for purposes of navigation, nor from entirely abandoning the canal at pleasure, or requiring that it should be kept

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in repair. The character of the work was such that the right of the State and its grantees to use all the water, or to abandon the enterprise entirely, was necessarily incident to the situation. By their lease, the lessees simply obtained the privilege of using for motive power at their mill wheels so much of the surplus water, passing through the canal, as was not necessary to carry out the primary purpose for which the work was constructed. The State and its grantees, who succeeded to its rights and liabilities, had the right to resume the use of all the water, or to abandon the canal entirely at pleasure. Whether they exercised the right of abandonment, or resumption, the effect upon the privilege granted to the lessees was the same. In neither event did the lessor become liable to any other consequence than the inability to collect rent from the lessees. *Hubbard v. City of Toledo*, 21 Ohio St. 379; *Fox v. Cincinnati*, 104 U. S. 783; *Sheets v. Selden*, 7 Wall. 416. As was in effect said by the court in *Fishback v. Woodruff*, 51 Ind. 102, the lessees took the lease subject to the use of the canal and to all the vicissitudes which might attend a public work of this character, such as dilapidation, destruction, abandonment. They could not suppose that the State or its grantees would keep up the canal for the purpose of furnishing them water-power if it became inexpedient to maintain it as a public work. It necessarily follows that the privilege granted to the lessees was at all times subject to two contingencies. The prime contingency was, that all the water flowing through the canal might be employed for the purposes of navigation; the other was, that the canal might become out of repair and be abandoned as a public work entirely. In either event, the privilege of the lessees was subordinate to the requirements of the public, or liable to be cut off entirely, unless by the mere grace of the State and its grantees. The covenant for quiet enjoyment, which the law annexed to the lease in controversy, was, therefore, such that so long as the canal was used for purposes of navigation, and while there was, during

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the period it was so used, a surplus of water above that which was required for navigation, the lessors agreed that they would do no such acts as would interrupt or deprive the lessees of its enjoyment. This was the extent of the covenant, because the privilege granted, and to which the covenant related, extended no further. So long, therefore, as the owners do no act in violation of this covenant they can not be liable for a breach of the covenant of quiet enjoyment.

The canal having been abandoned for purposes of navigation, possibly the grantees of the State, had they so elected, might have kept it in such a condition of repair as to have afforded water-power for mills and manufactories. It is abundantly settled, however, that they were under no obligation to do so. *Trustees, etc., v. Brett*, 25 Ind. 409; *Skillen v. Water-Works Co.*, 49 Ind. 193; *Fishback v. Woodruff*, *supra*; *Elevator Co. v. Cincinnati*, 30 Ohio St. 629; *Commonwealth v. Pennsylvania R. R. Co.*, 51 Pa. St. 351.

The question remains, had the State or its grantees the right to devote the canal and its bed to some other use, which would interrupt the flow of water, or were they under obligation, having abandoned it for purposes of navigation, to permit it to remain idle and unoccupied?

Having reached the conclusion that the lessors were not prohibited by the terms of the lease from using all the water in the canal, nor from abandoning it entirely for purposes of navigation, it necessarily follows that, in the absence of any contractual obligation, they had the right to appropriate the abandoned canal to any other use which they saw fit, if they could do so without invading or appropriating any of the lessees' property, which had lawfully been placed upon the lots appurtenant to the canal.

The appellants, impliedly at least, concede that the State and its grantees had the right to abandon the canal as a public work. Having the right to abandon it for that purpose, it never could have been intended that the lease should de-

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prive the owners of the property of the right to substitute another line or mode of transportation instead of that originally projected. To give the lease that effect would be to subordinate public interests to merely private convenience, the lessees, as we have seen, having acquired no continuing interest in the water of the canal.

The State invested its grantees successively with the same rights in the canal which it possessed when it transferred the work to the board of trustees. The trustees and their grantees acquired the rights of the State, and assumed its obligations, and none other. *Hubbard v. City of Toledo, supra.*

It would have been a barren security for the creditors of the State if they had been compelled to accept, in pledge of what the State owed them, a public work which had already proved unprofitable, and which they might abandon, but could never use for any other purpose, because certain leases of surplus water had been made. These leases, it must be remembered, too, were subordinate to the liens of the State's creditors. The lessees were, therefore, bound to take notice of the prior rights lawfully acquired at the time they took their leases. Those who acquired title under the pledge made by the State took all the rights of the State with precisely the same obligations as it owed in respect to outstanding leases.

The State, having come under no other covenant to the lessees except that it agreed not to interfere with their privilege of using the surplus water, not needed for navigation, so long as the canal was in operation for that purpose, had the right in the public interest to abandon the work or devote it to any other public use. Its grantees have the same right. *Commonwealth v. Pennsylvania R. R. Co., supra; Fox v. Cincinnati, supra.*

It does not appear that the railway company has invaded any of the appellants' property rights, or encroached upon the property leased, otherwise than by the obstruction of the canal. There is nothing in the cases of *French v. Gapen*, and

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Spears v. Gapen, 105 U. S. 509, in conflict with what has been herein decided.

In one of those cases a contractor for the construction of certain portions of the canal was, by the terms of an agreement made with the State, to be paid for his work in water rents. It was held that the contractor acquired a property right in the rents of the water-power, which he rendered available; and that the State became a trustee to collect and pay the rents to him until his debt was liquidated. In the other, a valuable privilege of a mill-owner was rendered useless by the construction of the canal. The canal commissioners agreed, in consideration that the mill-owner would release all claims, awards and judgments in his favor against the State, that the State would supply him in lieu of his privilege so destroyed with a certain amount of the surplus water from the canal. It was held that when the State transferred the canal to the board of trustees, the latter took it subject to the prior obligation of the State to the contractor and mill-owner, respectively.

The conclusion at which we have arrived is that the appellee is not liable upon the facts stated, and as the court below arrived at a like conclusion, its judgment is affirmed, with costs.

ZOLLARS, J., did not participate in the decision of this cause.

Filed May 10, 1887.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—We have again examined the questions presented in this case, and we can find no reason for receding from our former opinion. It still seems clear to us, that the lease under which the appellants claim did not convey any other right than that to use the surplus water not required for the purposes of navigation. The changed circumstances of which counsel so often speak did not enlarge the subject

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of the demise. The grantees of the State are not in a different position from that of their grantor, so far as respects the subject of the lease. That was not expanded by anything done by them or any one else. As said by the Supreme Court of Pennsylvania, in *Commonwealth v. Pennsylvania R. R. Co.*, 51 Pa. St. 351, "In determining the meaning of the contract, the subject of the grant is very material to be considered. It was surplus water."

When the canal was abandoned, there was no subject upon which the lease could operate, and it ceased to be effective. This result, as the decisions referred to in the original opinion clearly show, the lessor was not bound to prevent. There was no obligation, express or implied, that water should always be supplied, nor that the canal should be so maintained as that the lease should remain operative. On the contrary, the clear implication is, that when the subject of the lease ceased to exist, the rights of the parties under it terminated fully and completely. If this be true, and we can see no reason for doubt, then it must be true that the State or its grantees had a right to do with the canal property what any owner might do. This is substantially the doctrine of *Fox v. Cincinnati*, 104 U. S. 783, where it was said, in speaking of the canal: "When it was no longer needed, it might be abandoned; and, if abandoned, the water might be withdrawn altogether."

The appellants did not acquire any corporeal property; all that they acquired was an incorporeal right. Their right was to use the water, for they did not acquire any right to the *corpus* of the water, much less to any of the land. Angell Water-courses, section 90. The incorporeal right which they acquired was to the use of the surplus water, and when the abandonment of the canal for the purposes of navigation made it impossible that there should be surplus water, the incorporeal property which formed the subject of the lease ceased to exist. If the subject of the lease—that is, the incorporeal right to the use of the surplus water—ceased to exist

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when the canal was abandoned, then the appellants had no longer any right in the canal or its appurtenances, because the only property on which their lease could operate was gone.

Petition overruled.

Filed Oct. 18, 1887.

111	453
111	510
111	453
126	61

No. 12,896.

SWANK v. HUFNAGLE.

MORTGAGE.—Validity.—Lex Situs.—The validity of a mortgage of real estate is to be determined by the law of the place where the property is situated.

SAME.—Married Woman.—Surety.—A mortgage executed in Ohio by a married woman, as surety for another, upon land owned by her in this State, is void under the statute of 1881.

PLEADING.—Foreign Statute.—Where a pleading is founded on a foreign statute the statute must be set out.

From the Miami Circuit Court.

H. J. Shirk, J. Mitchell, C. H. Aldrich and O. Gresham,
for appellant.

R. P. Effinger and R. J. Loveland, for appellee.

ELLIOTT, J.—The appellant sued the appellee, Melissa Hufnagle, and her husband, upon a note and mortgage executed in Darke county, Ohio, on land situated in this State. The appellee, Melissa Hufnagle, answered that she was a married woman, and that the mortgage was executed by her as the surety of her husband, and assumed to convey land in this State owned by her. The appellant replied that the contract was made in Ohio, and that by a statute of that State a married woman had power to execute such a mortgage, but the statute of Ohio is not set forth.

The trial court did right in adjudging the reply bad. The validity of the mortgage of real property is to be determined by the law of the place where the property is situated. Mr. Jones says: "A mortgage of course takes effect by virtue

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of the law of the place where the land is situated." 1 Jones Mortg., section 823. This is well settled law. Story Conflict of Laws (8th ed.), 609, auth. n.; *Bethell v. Bethell*, 92 Ind. 318.

Judge Story, in sections 66 and 102 of his work on the Conflict of Laws, does not treat of conveyances or mortgages of land, but of contracts of an entirely different class, so that the appellant gets no support from what is there laid down as the law.

Under the act of 1881 a mortgage executed by a married woman as surety on land owned by her in this State is void.

There is another reason for adjudging the reply bad, and that is this, it does not set out the foreign statute on which it professes to be based. It is well settled that where a pleading is founded on a foreign statute the statute must be set forth. *Wilson v. Clark*, 11 Ind. 385; *Mendenhall v. Gately*, 18 Ind. 149; *Kenyon v. Smith*, 24 Ind. 11; *Tyler v. Kent*, 52 Ind. 583; *Milligan v. State, ex rel.*, 86 Ind. 553.

We can not disturb the finding on the evidence.

Judgment affirmed.

Filed May 26, 1887.)

ON PETITION FOR A REHEARING.

ELLIOTT, J.—In the argument on the petition for a rehearing, counsel contend that we were in error in holding that a mortgage executed by a married woman in Ohio as surety for her husband can not be enforced in this State, and they refer us to cases holding that the construction of a contract is governed by the law of the place where it was made. But the argument is unavailing, for counsel mistake the point in dispute. The question is not how the contract shall be construed, but had the married woman capacity to execute it? The question is one of capacity, not of construction. The trial court was not asked to construe a mortgage, but to enforce one which our statute declares shall not be enforceable. The purpose of the suit is not to obtain a judicial interpre-

Swank v. Hufnagle.

tation of a contract, but to foreclose a mortgage which our law declares a married woman has no capacity to execute.

We suppose it quite clear that if the mortgagor has no capacity to execute a deed or mortgage, the instrument can not be enforced, although the incapacity is established by the law of the place where the land is situated. If, for instance, a married woman should execute a deed or mortgage without her husband joining with her, it could not be enforced in a State where the law required her husband to join. This is so because the question is one of power, and power is created or withheld by the law of the place where the land lies. It is hardly necessary to cite authorities upon this elementary proposition, but there is so conveniently at hand a decision of the Supreme Court of Ohio, where the rule is affirmed, that we cite it. *Brown v. National Bank*, 44 Ohio St. 269. In that case it was said: "We are not unmindful of the principle that deeds intended to convey or encumber an interest in land situated in one State, executed in another, must derive their vitality from the laws of the former."

Our statute provides that the deeds of persons under twenty-one years of age shall be voidable, and this law would undoubtedly entitle an infant under that age to avoid a deed to land in this State executed in Ohio, and the principle in such a case is the same as that which rules here, for, in both cases, the question is one of capacity. In discussing this question an American author says: "But, in reference to contracts about the sale and conveyance of land such capacity depends upon the laws of the State wherein the land is situated. This is the general ruling in America as to the law upon these subjects, in whatsoever court the question may arise, domestic or foreign. This rule applies to questions of infancy, coverture, majority and of legal capacity generally." Rorer *Inter-State Law*, 190; 1 *Jones Mortg.*, section 662; 4 *Kent Com.*, star p. 441.

Petition overruled.

Filed Sept. 28, 1887.)

No. 13,411.

RICHTER v. RICHTER ET AL.

DEED.—*Consideration.*—*Condition Subsequent.*—*Care and Support.*—*Quieting Title.*—*Construing Together Contemporaneous Instruments.*—A father executed to his son a warranty deed, in which the consideration was stated to be one thousand dollars. Contemporaneously, and as a part of the same transaction, the son executed to the grantor an instrument called a mortgage to secure the performance of agreements and stipulations therein set out for the support and maintenance of the latter during his natural life, which in fact constituted the sole consideration for the deed. It was provided that the son should occupy the land during the grantor's life. He went into possession and so continued for three months, giving his father proper support and treatment. The grantor then, being old and childish, ordered the grantee to leave the farm, which he did, without offering further performance of the contract. The grantor remained in possession, others giving him support, and shortly afterwards demanded a reconveyance on the ground that the grantee had failed to comply with the contract, but never made a demand for maintenance. Suit by him to quiet his title.

Held, construing both instruments together, that the deed was upon a condition subsequent, which, being broken, entitled the grantor to the relief asked.

Held, also, that the abandonment of the land by the grantee was, under the circumstances, such a renunciation of the contract as authorized the grantor to enter and treat the arrangement as at an end.

Held, also, that the grantor's continuance in possession after condition broken was equivalent to a re-entry for the breach.

From the Vigo Superior Court.

S. C. Stimson and *R. B. Stimson*, for appellant.

S. C. Davis and *S. B. Davis*, for appellees.

MITCHELL, J.—This was a suit by Henry G. Richter against George W. Richter and wife, to quiet title to a tract of land theretofore alleged to have been conveyed by Henry G. to George W. Richter, upon a condition subsequent.

The court found the facts specially, which, so far as they are material to be stated, are as follows: On the 30th day of July, 1883, Henry G. Richter, being the owner of fifty acres of land in Vigo county, executed a warranty deed

111	456
114	295
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128	414
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128	126
111	456
138	361
111	456
162	15
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162	532
111	456
167	109

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therefor, in the statutory form, to George W. Richter. The consideration mentioned in the deed was one thousand dollars. The only consideration in fact, as the court finds, was that the grantee agreed to support, maintain and care for the grantor, who was the father of the grantee, during his natural life. Contemporaneously with the execution of the deed, and as a part of the same transaction, the grantee, George W., executed to his father what purports to be a mortgage, which was intended to cover the same land. The purpose of the mortgage as recited therein was, "to secure the payment, when the same becomes due, of taking care of the said Henry G. Richter during the balance of his natural life, including boarding, lodging and washing; and it is expressly agreed, that the said George W. Richter shall maintain the said Henry G. Richter in a decent and respectable manner, with good wearing apparel, and pay some debts that the said Henry G. Richter now owes, and at the death of said Henry G. Richter, the said George W. Richter is to bury him in a respectable manner, at his expense; and the said George W. Richter is to move on the place and stay on the place as long as the said Henry G. Richter shall live, and in case of sickness, the said George is to furnish the said Henry with medical attendance."

It is found that, concurrently with the execution of the deed and mortgage, George W. took possession of the land, together with the personal property theretofore owned by his father. The personal property was sold and the proceeds applied to the payment of the father's debts. The son remained in possession from July 30th to October, 1883, meanwhile giving his father proper support and treatment. The father then ordered the son off the place, whereupon the latter left, moving into his own house on a farm near by.

In January, 1884, Henry G. Richter made a written demand on George W. for a reconveyance of the land, stating as a cause therefor, that the latter had failed to comply with his contract of purchase in relation to the father's support.

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Suit was brought the day following the demand. Henry G. Richter, the grantor, remained in possession of the land after the removal of George W., being cared for meanwhile partly by his son-in-law, and partly by other people. No demand was ever made by Henry G. upon George W. for support or medical attendance.

Henry G. Richter was eighty-two years old, feeble in body and mind, very childish, troublesome, and hard to get along with, all of which was known to his son, George W., at the time he entered into the agreement with his father.

Upon the foregoing facts the questions for consideration are, whether or not the deed was upon a condition subsequent, and if it was, whether the condition has been broken so as to entitle the grantor to defeat the estate.

It will be observed that the special findings make it appear that the sole consideration for the deed was the agreement set forth in the mortgage. The deed and the instrument alleged to be a mortgage manifest the entire transaction between the parties. These instruments, relating to the same subject-matter, having been executed concurrently as parts of the same transaction, are to be construed together.

Giving full effect to the rule that conditions subsequent, as they "go in destruction and defeasance of estates, are odious in law, and shall be taken strictly," we are, nevertheless, constrained to the conclusion that the deed and mortgage, taken together, create an estate in the grantee upon the condition subsequent, that the latter shall perform the terms stipulated in the mortgage. True, neither the deed nor the mortgage states in express terms that the estate is granted upon condition, but the word "condition" is not necessary to the creation of an estate upon condition, if it plainly appears from the words used that the intent of the parties was to create an estate of that description. *Stilwell v. Knapper*, 69 Ind. 558 (35 Am. R. 240). In the construction of deeds, as in construing other writings, courts seek to ascertain and give effect to the real intention of the parties, as such intention

Richter v. Richter *et al.*

may be gathered from the language of the whole instrument. The intention is what the law applies itself to in deeds. *Watters v. Bredin*, 70 Pa. St. 235.

If from the nature of the acts to be performed by the grantee, and the time required for their performance, it is evidently the intention of the parties that the estate shall be held and enjoyed on condition that the grantee perform the acts specified, then the estate is upon condition. This is especially so when the grantor has reserved no other effectual remedy for the enforcement of performance on the part of the grantee. In such a case a condition subsequent arises by clear implication. 2 Washb. Real Prop. 7.

The mortgage, so called, evidently drawn after a printed form, recites that it was given "to secure the payment, when the same becomes due, of taking care of Henry G. Richter," etc. Then follow the stipulations or agreements to be performed by the grantee in the deed. The words "to secure the payment, when the same becomes due," are manifestly meaningless. Rejecting these words as surplusage, and considering that the conveyance was made without any other consideration than the agreement which follows, "the terms stated must be regarded as expressive of conditions subsequent, a breach of which might forfeit the estate." *Wilson v. Wilson*, 86 Ind. 472; *Lindsey v. Lindsey*, 45 Ind. 552; *Risley v. McNiece*, 71 Ind. 434.

The deed and mortgage constituted a conveyance upon a condition subsequent and also a lien upon the land. *Copeland v. Copeland*, 89 Ind. 29.

The case is parallel in principle with *Leach v. Leach*, 4 Ind. 628. In that case a father conveyed a farm to his son for the nominal consideration of one dollar. Contemporaneously with the conveyance the son executed a bond to the father in which, after reciting the conveyance, he bound himself, in consideration thereof, to cultivate the land and deliver a certain share of the crops to the grantor during his lifetime. It was held that the son took the land upon a condition subse-

quent that he would in all things substantially comply with his covenant.

Manifestly, if the so-called mortgage can only be treated as creating a personal covenant to perform the stipulations therein contained, it is practically inoperative as a security in many respects. Suppose the mortgagee should institute a proceeding to foreclose his mortgage for a failure to perform the covenants, how much would there be due? or what would be the measure of his recovery?

The very fact that the grantor has reserved no other effectual remedy for a breach of the terms upon which the conveyance was made, persuades us to the conclusion that the agreements written in the mortgage must be construed as though they were incorporated in the deed as expressive of the conditions upon which it was made.

Regarding the stipulations in the mortgage as the terms upon which the conveyance was made, the deed becomes a grant, reserving to the grantor the support and maintenance specified; or in default of the grantee, it authorizes the grantor to re-enter for condition broken.

Having arrived at the conclusion that the transaction created an estate upon condition, it is also clear upon the facts found that the condition was broken.

The purpose of creating the estate was to afford support and maintenance for a feeble, childish old man, eighty-two years of age. One of the conditions was that the son should occupy the farm during the lifetime of his father, and support and maintain him, in the infirmities and decrepitude of old age. After occupying the farm less than three months, and converting the personal property and applying the proceeds to paying the father's debts, he left the farm at the mere bidding of a childish old man, leaving him to the care of others. Knowing the age and condition of his father at the time he took the conveyance, it was the duty of the son to remain and execute his agreement, unless it became impossible to do so. The facts found leave the impression that

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the son availed himself of the earliest opportunity to find an excuse for leaving. Having abandoned his father without more of an effort to execute the agreement than appears to have been made, he may not now say that the grantor has rendered it impossible for him to perform the conditions by "ordering him to leave."

The grantor having continued in possession after condition broken by the grantee, this was equivalent to a re-entry for breach of the condition. Having remained in possession, and made formal and unequivocal demand for a reconveyance, on the ground that the grantee had failed to perform the conditions upon which the deed was executed, nothing further was necessary in order to entitle him to maintain an action to quiet his title. *Clark v. Holton*, 57 Ind. 564; *Frost v. Butler*, 7 Maine, 225; *Hubbard v. Hubbard*, 97 Mass. 188; *Watters v. Bredin*, *supra*.

The grantee having abandoned the land without sufficient excuse, and without offering to perform a continuous and fixed duty which rested upon him, no demand for performance was necessary in order to entitle the grantor to re-enter. Abandoning the land, under the circumstances, must be regarded as equivalent to such a renunciation of the contract as authorized the grantor to enter and treat the arrangement as at an end. *Ellis v. Elkhart Car Works Co.*, 97 Ind. 247.

Upon the facts specially found by the court, the conclusions of law should have been that the estate of George W. Richter was upon a condition subsequent, which had been broken, and that the title of Henry G. Richter be quieted.

Judgment reversed, with costs, with directions to the court below to restate its conclusions of law and give judgment therein in accordance with this opinion.

Filed June 29, 1887; petition for a rehearing overruled Sept. 29, 1887.

No. 13,248.

KLINE v. NATIONAL BENEFIT ASSOCIATION.

LIFE INSURANCE.—*Policy Incontestable Except for Fraud.—Non-Payment of Premium.—Taking Order.—When Insurer Estopped to Deny Payment.*—Where both the policy of insurance, which provides that it is incontestable except for fraud, and the application state, the one by express words and the other by clear implication, that the consideration has been paid, the insurer is estopped to deny payment as against the beneficiary, and the policy is enforceable by the latter, notwithstanding part of the premium was not in fact paid, but instead orders were given therefor by the assured on his employer, who, at his request, refused to pay them, and although the orders stipulated that if they were not paid the assured's rights were thereby forfeited.

SAME.—*Interest of Beneficiary in Policy.—Not Affected by Subsequent Acts of Assured.*—The beneficiary in an ordinary contract of insurance takes an immediate interest in the policy, and his rights can not be impaired by any act of the assured performed subsequent to its execution.

From the Marion Superior Court.

N. Morris, L. Newberger and J. B. Curtis, for appellant.
J. Buchanan, for appellee.

ELLIOTT, C. J.—The policy of insurance on which this action is based contains, among others, this provision: "This certificate shall be incontestable for any cause except fraud or misrepresentation in the application or proofs of loss, or failure to report to the association any change of occupation that would make the risk a more hazardous one, or failure to comply with the conditions above specified." The policy also recites that an admission fee of eight dollars has been paid, and that six advance assessments, amounting to nine dollars and sixty cents, have been paid to the association.

In the application is written: "I hereby agree to pay on becoming a member the following:

Admission fee.....	\$8 00
Dues	
Assessments of \$1.60 each.....	9 60
Total.....	\$17 60

"I have received for the above, binding receipt No. 6,337.

111 462
168 390
163 394

Kline v. National Benefit Association.

“N. B.—If the number of a binding receipt is inserted, it becomes conclusive evidence that the above amount has been paid; if no number of a binding receipt is inserted, the payment is to be made upon the delivery of the certificate.”

The number of the binding receipt, as it is called, was inserted in the policy. The assured did not make full payment in money, but, as payment of part of the consideration of the contract, gave two orders, reading substantially as follows:

“\$5.60.

INDIANAPOLIS, July 24th, 1882.

“Please pay the National Benefit Association, 66 East Market street, Indianapolis, Ind., five $\frac{60}{100}$ dollars out of my wages for the month of August, 1882, to be applied as follows: Admission fee, \$4; expense fee and assessments, \$1.60. If this order is not paid, then all my rights in said association are thereby forfeited. I hereby authorize said association to deduct from moneys due on account of injuries any indebtedness there may be against my certificate.

(Signed)

“NICK KLINE.”

Payment of these orders was refused because Kline notified the railroad company upon whom they were drawn not to pay them. The policy was taken out for the benefit of the appellant, the mother of the assured, and the assured was accidentally killed within one hundred days after the policy was issued.

There was no error in admitting both of the orders in evidence, although only one was pleaded in the appellee's answer. This is so because the general denial pleaded enabled the appellee to give evidence contradicting that of the appellant upon the question whether or not the assured had performed the conditions of the contract on his part. *National Benefit Ass'n v. Bowman*, 110 Ind. 355.

The language of the application and of the policy declaring that the policy shall be incontestable except for fraud is unusually strong and clear. It is declared that if a binding receipt is issued, and its number inserted in the policy, the

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policy "shall be incontestable." It seems clear that, having made this express and strong statement, the association can not be allowed to affirm as against the beneficiary, however it may be as to the assured, that the conditions precedent to the validity of the policy were not performed.

The case of *Wood v. Dwarris*, 11 Exch. 493, is a much stronger one in favor of the insurer than the present. In that case the policy itself contained an express stipulation that if any untrue statements were made it should be void; but in a prospectus issued by the company it was provided that all policies should be indisputable except in case of fraud, and it was held that, notwithstanding the provision in the policy, the insurer could only avoid the policy for fraud. In the course of the opinion delivered in that case, Baron ALDERSON said: "When the plaintiff went to their office, the defendants professed to grant him an assurance on those terms; therefore, they can not now set up as a defence that the statement in the proposal was untrue, unless they add that it was fraudulently untrue, for they have, in fact, said they will never make any other defence." This case was approved in *Wright v. Mutual Benefit Ass'n*, 43 Hun, 61 (35 Alb. L. J. 323).

In *Wheelton v. Hardisty*, 8 Ellis & B. 232 (276), it was said by Lord CAMPBELL: "According to the case of *Wood v. Dwarris*, 11 Exch. 493, the equitable replication would be sufficient without the special fraud thus imputable to the fourth plea; and we ought to be bound by that decision, even if we doubted the propriety of it: but I must say that I heartily concur in it." There are other cases which recognize the general principle which applies here. *Wontner v. Shairp*, 4 Man., G. & S. 404; *Watson v. Earl of Charlemont*, 12 Q. B. 856; *Horwitz v. Equitable Ins. Co.*, 40 Mo. 557; *Steele v. St. Louis M. L. Ins. Co.*, 3 Mo. App. 207.

Whether the assured could have availed himself of the benefit of that part of the policy which stipulates for the payment to him of weekly benefits, in case of an accidental injury,

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we need not decide, for here the claim is made by the beneficiary to whom the association agreed to pay one thousand dollars in the event of the death of the assured. The beneficiary took an immediate interest in the policy, and her rights could not be impaired by any act of the assured performed subsequent to the execution of the policy, for the contract is that of an ordinary insurance company, and not that of a benevolent organization. *Supreme Lodge, etc., v. Schmidt*, 98 Ind. 374; *Damron v. Penn M. L. Ins. Co.*, 99 Ind. 478; *Harley v. Heist*, 86 Ind. 196 (44 Am. R. 285); *Wilburn v. Wilburn*, 83 Ind. 55; *Pence v. Makepeace*, 65 Ind. 345.

The act of Kline in securing a refusal to pay the orders might, perhaps, have precluded him from recovering under the policy, but it can not prejudice the rights of the appellant. The case, therefore, is not affected by the wrongful act of the assured in securing the refusal to pay his orders, but it is to be determined upon the legal effect of the original contract between the insurer and the assured.

There is a valid reason for making a distinction between the rights of the assured and the beneficiary in such a case as the present. Here, the application endorsed on the policy provides, that the "binding receipt," when its number is inserted in the policy, "shall be conclusive evidence that the above amount has been paid," and the policy itself declares that it shall be incontestable except for fraud; and when these instruments are placed in the hands of the beneficiary, as in this case, the insurer ought, on plain principles of justice, to be estopped to assert that the premium due under the provisions of the policy had not been paid. It is difficult to perceive how stronger representations could be made, and to permit the insurer to avoid them would in many cases be unjust, for it might well be that the beneficiary, if not misled, would pay the premium. Some of the authorities go so far as to hold that, upon grounds of public policy, an insurer

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ance company will be held estopped to deny, as against its acknowledgment, that the consideration for the policy has been paid. *Teutonia Life Ins. Co. v. Anderson*, 77 Ill. 384.

It is held by many courts, including our own, that where a promissory note is taken in payment of the premium, the failure to pay the note will not forfeit the policy although it is so stipulated in the note. *Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7; *Northwestern M. L. Ins. Co. v. Little*, 56 Ind. 504; *Hull v. Northwestern M. L. Ins. Co.*, 39 Wis. 397; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Insurance Co. v. Dutcher*, 95 U. S. 269; *Ohde v. Northwestern Life Ins. Co.*, 40 Iowa, 357; *Insurance Co. v. Bonner*, 36 Ohio St. 45.

In the case of the *National Benefit Ass'n v. Jackson*, 114 Ill. 533, it was held, in an action upon a policy like the one before us, that the order was a payment of the premium, although the insurer was unable to collect it.

Our conclusion is that the appellee is estopped, as against the beneficiary, to aver that the sums mentioned in the binding receipt and acknowledged in the policy to have been paid were not paid.

But if it were granted that there was no estoppel, we think the judgment must be reversed, because the contract does not entitle the appellee to declare a forfeiture for non-payment of the orders received from the assured. Taking into consideration the whole contract, as evidenced by all the written instruments, there was no cause for forfeiting the policy. The only clause which professes to give a right to declare a forfeiture is the brief clause contained in the orders given by the assured, and this can not be allowed to prevail against the statements in the application, the acknowledgment in the policy, the provision that it shall be incontestable except for fraud, and the recitals of the binding receipt. The clause in the order which reads thus, "I hereby authorize said association to deduct from moneys due on account of injuries any indebtedness there may be against my certificate," is inconsistent with the theory that the existence of an indebtedness

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forfeited the policy. At all events, there are no such strong and clear words as require the courts to adjudge that the insurer had a right to declare the policy forfeited. *Northwestern M. L. Ins. Co. v. Hazelett*, 105 Ind. 212 (55 Am. R. 192); *Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7; *Northwestern M. L. Ins. Co. v. Little*, 56 Ind. 504.

The judgment is reversed, with instructions to award the appellant a new trial, and for further proceedings in accordance with this opinion.

Filed April 26, 1887; petition for a rehearing overruled Sept. 28, 1887.

 No. 11,075.

ST. CLAIR ET AL. v. MCCLURE.

TAX SALE.—When not Void.—Lien of State.—Complaint to Set Sale Aside — Injunction.—Where a taxpayer has sufficient personal property to pay his taxes at the time his land is sold for that purpose, the sale is ineffectual to convey title, but it will transfer to the purchaser the lien of the State, and is, therefore, not absolutely void; and a complaint to set aside the sale and to enjoin the auditor from issuing a deed on that ground will not lie.

From the Ripley Circuit Court.

H. C. Jones, E. P. Ferris, J. L. Benham, W. W. Spencer and *J. S. Ferris*, for appellants.

D. P. Baldwin, Contra.

NIBLACK, J.—Complaint by Samuel McClure against Henry St. Clair and John H. Wernke, auditor of Ripley county, to set aside a sale of lands for taxes, and for an injunction. The complaint averred that the plaintiff was the owner of certain particularly described tracts of land in Ripley county, and that he became such owner, by purchase at a sheriff's sale, on the 7th day of January, 1879; that, on

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133	101

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the 25th day of February, 1881, there stood charged against said lands, as for delinquent and unpaid taxes, the sum of \$336.59; that said sum consisted of unpaid taxes assessed against one William Hawthorn, the former owner, for the years 1872, 1873, 1874, 1875, 1876 and 1877, and taxes assessed against the plaintiff for the current year of 1880, and penalty, interest and costs; that, on that day, the treasurer of Ripley county sold such lands to the defendant St. Clair, at private sale, for said sum of \$336.59 to pay such delinquent taxes; that the said Wernke, who was then auditor of said county of Ripley, thereupon issued to the said St. Clair a certificate of purchase, which declared that the latter would be entitled to a deed for said lands at the expiration of two years, in the event that such lands should not be sooner redeemed; that during said years of 1873, 1874, 1875, 1876, 1877 and the year 1878, the said Hawthorn was the owner of personal property situate in said county of Ripley, and subject to levy and sale for that purpose, sufficient to have paid all the taxes due from him during all those years respectively; that the plaintiff had paid to the treasurer of Ripley county all the taxes, including penalty, interest and costs, which had been assessed against him since he had become the owner of said lands; that if the said Wernke should not be enjoined and inhibited he would, at the end of two years from the said 25th day of February, 1881, execute and deliver to his co-defendant, St. Clair, an auditor's deed conveying the lands so sold to the latter on account of the non-payment of delinquent taxes. Wherefore it was demanded that the sale of such lands to the said St. Clair should be set aside, and that the said Wernke should be enjoined and inhibited from either executing or delivering to the said St. Clair a deed for the lands.

St. Clair and Wernke demurred separately to the complaint, but both of their demurrers were overruled.

Some further proceedings put the cause at issue and led to the substitution of Nicholas Cornet as a defendant instead of

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Wernke, whose term of office had in the meantime expired, and who had been succeeded by the said Cornet. After hearing the evidence the court made a finding for the plaintiff, and entered a decree setting aside the sale to St. Clair and enjoining and inhibiting Cornet from either executing or delivering a deed to St. Clair in accordance with the terms of such sale.

In the recent case of *State, ex rel., v. Casteel*, 110 Ind. 174, it was, upon full consideration and a careful review of our decided cases, held that, under section 6487, R. S. 1881, when construed in connection with other provisions relating to the same subject, there were only three contingencies in which the sale of lands for delinquent taxes is absolutely void—that is to say, ineffectual for any purpose—the first being where the lands shall not have been liable to taxation; the second where the taxes have been paid before the sale; and the third where the description on the tax duplicate is so imperfect as to fail to identify the land. It was further held that, under the succeeding section (6488), the lien, which the State has on the lands so sold, is, in all other cases, transferred to, and vested in, the purchaser, his heirs or assigns; and that, in case the sale fails to convey title, the amount paid by the purchaser may be recovered back by the enforcement of his acquired lien against the lands.

These holdings led us to the very natural conclusion that no sale of lands for taxes due, which transfers to, and vests the lien of the State in, the purchaser, can properly be treated as, or adjudged to be, a void sale, and to that conclusion we still adhere.

Our cases have quite uniformly recognized the doctrine that if the taxpayer has sufficient personal property to pay his taxes at the time his lands are sold to pay them, the sale is ineffectual to convey title; but the rule of decision that the sale of lands for taxes, under such circumstances, transfers to the purchaser the lien of the State, is quite, if not equally, well recognized. *Ward v. Montgomery*, 57 Ind. 276;

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Flinn v. Parsons, 60 Ind. 573; *Hosbrook v. Schooley*, 74 Ind. 51; *Bender v. Stewart*, 75 Ind. 88; *Lawson v. Hilgenberg*, 77 Ind. 221; *Sloan v. Sewell*, 81 Ind. 180; *Parker v. Goddard*, 81 Ind. 294; *Orecelius v. Mann*, 84 Ind. 147; *Jenkins v. Rice*, 84 Ind. 342; *Schrodt v. Deputy*, 88 Ind. 90; *Locke v. Catlett*, 96 Ind. 291; *Hilgenberg v. Board, etc.*, 107 Ind. 494; *Ludlow v. Ludlow*, 109 Ind. 199; *State, ex rel., v. Cas- teel, supra.*

This doctrine, and the rule of decision stated, rest upon the established theory that where a taxpayer owns both real and personal property, the latter is primarily liable for all the taxes assessed against him, but that a lien nevertheless attaches to the real estate for accruing taxes, by which it becomes secondarily, and, if need be, ultimately, liable for the payment of such taxes, and upon the further theory that the lien which so attaches is not divested by the failure of the proper officer to seize and sell personal property, but is transferred to, and vested in, the purchaser when the real estate is sold for the non-payment of the taxes.

It follows that the complaint did not state a sufficient cause either for setting aside the sale to St. Clair, or for an injunction against the auditor, and that, in consequence, both demurrers to it ought to have been sustained.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Filed May 24, 1887; petition for a rehearing overruled Sept. 28, 1887.

Ward *et al.* v. Harvey, Administrator.

No. 12,775.

WARD ET AL. v. HARVEY, ADMINISTRATOR.

111	471
129	396

111	471
160	643

TRUST AND TRUSTEE.—*Real Estate.—Disavowal of Trust.—Notice.—Acquiescence.—Action to Recover.—Adverse Possession.—Statute of Limitations.—*

Where a trustee disavows the trust, asserts title in himself, and holds adverse possession for more than twenty years, and the beneficiary, with notice, acquiesces therein, an action to recover the land is barred.

From the Grant Circuit Court.

J. F. McDowell, G. A. Henry and J. Brownlee, for appellants.

A. Steele, R. T. St. John and W. H. Charles, for appellee.

ELLIOTT, J.—The appellants seek to recover money in the hands of the appellee, as the administrator of the estate of John Ward, deceased. The money sought to be recovered was received by the appellee from the sale of land of which his intestate held the title. The sale was made upon the petition of the appellee, as administrator of John Ward's estate, in order to pay the debts due from the estate, and the appellants were made parties to the petition.

There is evidence showing that in 1850 the intestate received money from the appellants, and that he invested it, with some of his own, in the purchase of land in this State. The theory of the appellants is that, as they furnished part of the purchase-money, a trust resulted in their favor, and that their right of action is not barred by the statute of limitations.

There are authorities maintaining the proposition that the statute of limitations will run against a resulting trust. *Newsom v. Board, etc.*, 103 Ind. 526; *Smith v. Calloway*, 7 Blackf. 86; *Musselman v. Kent*, 33 Ind. 452; Wood Limitation of Actions, 413. But we do not place our decision upon this ground, for there is a plainer and stronger one.

If it were granted that the statute of limitations does not run against an acknowledged resulting trust, and that the

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judgment in the proceedings to obtain an order for the sale of the land to pay the debts of the estate of John Ward, deceased, did not conclude the appellants, still this appeal must fail. Conceding that when the land was acquired and title taken, as it was by John Ward, in 1850, and that it was taken in trust, there can be no recovery, because the evidence shows that more than twenty years prior to the time that this action was brought there was an open disavowal of the trust. The evidence, indeed, shows more than a mere disavowal of the trust, for it shows that the appellants acquiesced in the intestate's assertion of title. There is evidence very clearly showing that the intestate treated the land as his own, and that the appellants dealt with him as the owner. Under this evidence there can be no recovery, for it is well settled that where there is a disavowal of the trust, and it is brought to the notice of the beneficiary, the statute will run. As said in *Raymond v. Simonson*, 4 Blackf. 77: "But so soon as the trustee denies the right of his *cestui que trust*, and his possession becomes adverse, lapse of time from that period may constitute a bar in equity." 2 Perry Trusts (3d ed.), section 864; Wood Limitation of Actions, 433.

Judgment affirmed.

Filed June 18, 1887; petition for a rehearing overruled Sept. 27, 1887.

111	472
112	18
113	282
116	14
111	472
129	34
111	472
147	157
111	472
157	31

No. 13,019.

FERTICH v. MICHENER.

SCHOOLS.—Rules and Regulations.—Power of School Boards to Adopt.—Under the statutes of this State, construed in connection with the incidental powers of corporations, the various school boards, and other educational authorities, have power to adopt appropriate rules and regulations for the government of the schools under their control.

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SAME.—Method of Adopting Rules.—Superintendent or Teacher May Make.—

It is not necessary that all rules for the discipline and government of schools shall be made a matter of record by the school board, or that every act, order or direction affecting their management shall be authorized or confirmed by a formal vote; but any reasonable rule adopted by a superintendent or a teacher, not inconsistent with some statute or some other rule prescribed by higher authority, is binding upon the pupils.

SAME.—City Schools.—Authority of Superintendent.—A rule requiring the superintendent of city schools to visit weekly all the schools under his charge, and to see that the best methods of instruction are adopted, confers upon him authority, if it were otherwise wanting, to order and promulgate such additional reasonable rules as the best interests of the schools may require.

SAME.—Tardy Pupils.—Exclusion from School-Room During Opening Exercises.—Reasonableness of Rule.—A rule requiring tardy pupils to remain either in the hall of the school building, which is provided with heat, or in the office of the principal, until the opening exercises, lasting from ten to fifteen minutes, are concluded, in order that such exercises may not be interrupted or disturbed, is in itself a reasonable regulation.

SAME.—Enforcement of Rules.—Must be Reasonable Under the Circumstances.—In the enforcement of all rules for the government of a school, due regard must be had to the health, comfort, age, mental and physical condition of the pupils, and to the circumstances attending each particular emergency, and the condition of the weather, the infirmity of a pupil, and the like, may require relaxation in their strict enforcement.

SAME.—Unreasonable Enforcement of Reasonable Rule.—A school regulation must not only be reasonable in itself, but its enforcement must also be reasonable under all the circumstances. The habit of locking the doors of a school-room during the opening exercises is not an unreasonable enforcement, under ordinary circumstances, of a rule requiring pupils to remain in the hall during that time; but if the weather is unusually severe, and proper steps are not taken for the comfort of children thus excluded, such method of enforcement is unreasonable and improper.

SAME.—Liability of School Officer.—Error of Judgment.—A school officer is not personally liable for a mere mistake of judgment in the government of his school; but to create liability it must be shown that he acted in the matter complained of wantonly, wilfully or maliciously.

SAME.—Detention of Pupil After School Hours.—False Imprisonment.—The detention of a pupil for a short time after school hours, as a penalty for some omission or misconduct, is one of the recognized methods of enforcing discipline and promoting the progress of the pupils in the common schools, and although the detention be mistaken it possesses

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none of the elements of false imprisonment, unless imposed from wanton, wilful or malicious motives.

SAME.—*Reasonableness of Rule a Question of Law.*—*Instruction.*—It is for the court to determine, as a matter of law, whether or not a rule is a reasonable one, and an instruction which confounds the reasonableness of the rule with its unreasonable enforcement, and submits the matter of reasonableness to the jury as a hypothetical question, dependent upon the existence or non-existence of certain enumerated facts, thus making the question of validity one of mixed law and fact to be determined by the jury, is erroneous.

From the Shelby Circuit Court.

D. L. Wilson, J. B. McFadden and L. F. Wilson, for appellant.

B. F. Love, O. J. Glessner, E. K. Adams, L. J. Hackney, H. C. Morrison and N. B. Berryman, for appellee.

NIBLACK, J.—This was an action by Nora S. Michener, a minor child, acting through Louis T. Michener, her father and next friend, against William H. Fertich for alleged injuries received while attending a public school of which Fertich was the superintendent.

The complaint was in three paragraphs. The first charged that the plaintiff, during the school year commencing in September, 1884, was a resident of the city of Shelbyville in this State, and was a pupil at one of the public schools of that city; that, on the morning of the 22d day of January, 1885, which was an extremely cold day, the plaintiff, during school hours, repaired to the room in the public school building in which she was accustomed to receive, and for the purpose of receiving, instruction from her teacher; that she found the doors of her school-room locked, by reason of which she was unable to gain admittance, and was compelled to return to her home through snow and cold, which resulted in her having both of her feet frozen, and being thereby permanently injured, to her great damage; that she was so excluded from her school-room by order of the defendant, and that her injuries were not in any respect caused by any fault or negligence on her part.

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The second paragraph charged the defendant with having, on the 15th day of January, 1885, wrongfully and unlawfully restrained the plaintiff of her liberty for a period of thirty minutes.

The third paragraph charged that, on the 15th day of October, 1884, a certain rule for the government of the public school which the plaintiff was attending, as in the first paragraph stated, was in force and was in the following words: "When pupils respectfully ask permission to leave their room they must be permitted to do so;" that on that day the plaintiff, having a pressing necessity to do so, respectfully asked permission to leave her room, but that her teacher, acting under the order of the defendant, refused such permission, by reason of which she, the plaintiff, was subjected to great suffering and annoyance, and to consequences both repulsive and humiliating, and to her great damage.

The defendant answered:

First. That the hall in the school-building leading to the plaintiff's school-room, and where she entered the building and remained until leaving for home, was, on the morning complained of, comfortably warmed by a furnace immediately under it; that the daily sessions of the school were from 8:45 A. M. until 11:45 A. M., and from 1:15 P. M. until 4:15 P. M., which times had been fixed and notice thereof published by the board of school trustees of the city of Shelbyville, and of which the plaintiff had been fully informed; that, prior to the commission of the alleged grievances stated in the first paragraph of the complaint, the plaintiff had been instructed by her teacher that if she came to school after 8:45 A. M. and before 9 o'clock A. M., she should remain in the hall of the school-building, or go into the office of the principal of the school, in the same building, and remain there until the conclusion of the morning exercises, which last from ten to fifteen minutes, and which at no time extend beyond 9 o'clock A. M.; that the plaintiff, on the morning of the day named in said first paragraph of the com-

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plaint, came to the school-building after the morning exercises had begun, and, finding that she was not in time for such exercises, remained in the hall, which was then comfortably warm, for a period of seven minutes, when she left for home of her own accord, and without the knowledge or consent either of her teacher or of the defendant, thereby unnecessarily exposing herself to the snow and cold; that at no time during that morning was the defendant nearer than a distance of a half mile from said school-building; that if the plaintiff received any injury on the morning in question it was by reason of her own fault and negligence, and not on account of any act or omission of the defendant.

Secondly. Repeating the substantial facts set up in the first paragraph, but in a different and more condensed form.

Thirdly. That, as to the charge contained in the second paragraph of the complaint, the plaintiff was never kept or detained in the school-building, to which reference has been made, later than 4:15 P. M., the time fixed by the school trustees for the closing of the daily sessions of the school.

Fourthly. In general denial.

Issues were formed upon the first, second and third paragraphs of the answer by a reply in denial. A trial resulted in a verdict for the plaintiff and in a judgment on the verdict.

This action was avowedly commenced, and this appeal is seemingly prosecuted, more for the purpose of settling some general principles concerning the management of our public schools, than on account of the amount of damages actually involved in the controversy.

It was shown by the evidence that the school trustees of the city of Shelbyville, in May, 1884, appointed Fertich, the appellant, superintendent of the public schools of that city for the ensuing school year, and that he was, in connection with his duties as such superintendent, to perform some services as a teacher in the city high school, if required to do so; also, that such trustees had already adopted and promulgated

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a system of rules for the government of the public schools of the city, nearly all of which were read in evidence.

One of these rules prescribed the time to be occupied by the daily sessions of the schools, which was, in substance, as stated in the first paragraph of the answer. Another declared the right of every pupil to retire from the school-room when permission was respectfully asked, as set out in the third paragraph of the complaint. Others pertained to the duties of teachers, and still others had reference to the powers and duties of the superintendent.

The first of this latter class of rules was as follows:

“The superintendent shall have the supervision of all the schools and the general care of all school property, and act under the advice and direction of the board of trustees.”

The second declared that “He” (the superintendent) “shall be especially charged with the enforcement of the rules of the board, and be held responsible for the general management and discipline of the school.”

The third required the superintendent to visit weekly all the departments of the schools under his charge, and to see that the best methods of instruction were adopted.

The fourth required the superintendent to appoint meetings of teachers as often as necessary to secure uniformity of teaching and discipline, and to report to the trustees when a teacher should be found to be deficient and incompetent.

It was further made to appear that it was, and had previously been, the custom in the school which the appellee had been attending, to devote the first fifteen minutes after meeting in the morning to what was termed the opening, or morning, exercises, which consisted of prayers, chants, singing, reading, recitations, invocations and impressive short lessons, varied from time to time in the discretion of those in the immediate charge of the school; that on the morning of the 22d day of January, 1885, the temperature of the atmosphere stood at about 18° below zero, and that on that morning the appellee did not reach the school-building until

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after the opening exercises had begun ; that she found both of the doors leading to her school-room from the hall of the building locked ; that she tried both doors, and could not gain admission ; that the janitor of the building invited her to approach the register in the hall, which was apparently in reasonably well heated condition, and warm herself, but that she declined under the belief that she was not allowed to stand by the register without first obtaining the consent of her teacher ; that she had forgotten, if she ever knew, that she had the right to go into the principal's office and to remain there until the opening exercises were over ; that she, after remaining in the hall six or seven minutes, and finding that her feet were becoming quite numb and cold, left the building and returned home ; that on her way home her feet became frost-bitten or frozen ; that, in consequence, she became lame and disabled, and suffered great pain at times thereafter.

It was still further shown to have been the policy of the appellee's teacher to discourage the pupils, so far as practicable, from retiring from the room during school hours, and that the appellant had concurred in that general policy, but there was no evidence tending to show that he had ever instructed the appellee's teacher not to permit her, or any one else, to retire when permission was properly asked ; that the class to which the appellee belonged was usually dismissed as early as fifteen minutes past three o'clock in the afternoon ; that the appellee, in common with other pupils, was sometimes detained, or *kept in*, as it was usually termed, for ten or fifteen minutes after the class was dismissed, and required to further study her lessons during that additional time ; that the appellee usually had the impression, when she was kept in, that it was as a penalty for having retired from the room during the day, but as to the extent to which she was justified, if at all, in receiving such an impression, the evidence was conflicting ; that some time in October, 1884, the appellee asked permission to retire from her school-room,

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but that permission was refused upon the ground that the school would close for the day in ten or fifteen minutes; that, in consequence of such refusal, the appellee suffered annoyance and inconvenience and was subjected to shame and humiliation on her way home, she having an infirmity which required her frequent retirement.

It was also an admitted fact that, soon after the commencement of the school year of 1884 and 1885, the appellant directed the teachers under his charge to instruct their pupils that when any one of them should be *tardy*, that is, should not arrive at the school building until after the opening exercises for the day had begun, he or she should remain either in the hall, or in the principal's office, until such exercises were over, and that the instructions so to be given were to constitute a rule to be observed in the schools of the city; and the evidence tended to show that the appellee's teacher had to some extent, and at least in a general way, instructed her pupils as directed.

One of the teachers testified that when the appellant directed his teachers as stated, he assigned as a reason for ordering the promulgation of such a rule, that the character of the opening exercises was such that the coming in of pupils during their progress seriously disturbed them, and that, in answer to an inquiry as to how such a rule could be effectively enforced, he said that if he were a teacher he would not hesitate to lock the doors of his room if necessary; and the evidence further tended to show that the appellee's teacher was in the habit of causing the doors of her room to be locked while the opening exercises were being holden.

The appellant in his testimony admitted that he had on one occasion, not specifically described, directed the doors of the school-rooms to be locked, but denied that he had given any such a direction at the time the appellee was locked out, or that he had ever given any general direction that the doors should be locked during the opening exercises, and

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there was no evidence tending to prove that he had ever actually given any such a general direction.

It was further made to appear that, on the morning during which the appellee had her feet frozen, the appellant was not at, or immediately near, the building which the former attended, and that the latter was only occasionally at that building.

The court gave to the jury an elaborate and what seems to have been a carefully prepared series of instructions.

The sixth of the series was as follows: "What a reasonable rule is, is a question of law, and I do not hesitate to declare a rule that would bar the doors of a school-house against a little girl ten years of age, who had come one-fourth of a mile to school of a cold winter morning, when the earth was covered with snow, and the thermometer registering 18° below zero, exposing her to the cold, or excluding her from the fire, for no other reason than that she was a few minutes tardy, is unreasonable, and in its practical operation little less than wanton cruelty, and, therefore, unlawful, and can not justify the conduct of any teacher who enforces it, immaterial by what school authority enacted or directed."

The eighth instruction told the jury that "A rule or regulation made by a teacher, requiring pupils who are tardy to remain in the hall of the building, outside of the school-room, during the opening religious, sacred or singing exercises, to avoid interruption or confusion incident to their entry at such a time, for the space of fifteen minutes, is a reasonable rule and lawful, provided the hall is comfortable, and provided the hall is prepared to accommodate the needs and comforts of the pupils, and the doors may be closed and locked during this fifteen minutes if necessary to enforce observance of the rule; but if the hall is cold and uncomfortable the rule is not a reasonable one, and should not be enforced."

When a corporation is duly erected or established, the law tacitly annexes to it the power of making suitable rules, reg-

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ulations, by-laws, or ordinances for its own government and for the government of those over whom it may have jurisdiction or control. While this power of making such rules, regulations, by-laws or ordinances, as the case may be, is usually conferred in direct terms by the act of incorporation, it is nevertheless incidental to every corporation, whether municipal or private. 1 Blackstone Com. 476; 1 Dillon Munic. Corp. (3d ed.), section 308 and notes.

All by-laws and ordinances, and rules and regulations of the same general nature, must be suitably adapted to the purposes for which the corporation was organized, and can not be either inconsistent with the general law or the act of incorporation, or unreasonable or oppressive. Whether a by-law, or other kindred regulation, is reasonable or valid, is a question of law for the decision of the court, and hence not a question of fact for the determination of the jury. Dillon, *supra*, section 327; *Green v. City of Indianapolis*, 22 Ind. 192; *State, ex rel., v. White*, 82 Ind. 278 (42 Am. R. 496); *Angell & Ames Corp.*, section 357; 1 Morawetz Private Corp., section 497.

Section 4438, R. S. 1881, which has been in force since March 6th, 1865, declares each civil township and every incorporated town and city of the State to be a distinct municipal corporation for school purposes.

The next succeeding section requires the common council of each city, and the board of trustees of each incorporated town, respectively, to elect and to keep in office three school trustees, who constitute the school board of such city or town.

Section 4444, which has reference to township trustees as well as the trustees of cities and towns, provides that such trustees shall have charge of the educational affairs of their respective townships, towns and cities, and shall employ teachers and locate and establish a sufficient and convenient number of schools for the education of the children within their respective jurisdictions.

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Section 4445 authorizes the school trustees of such incorporated towns and cities to employ a superintendent for their schools, "and to prescribe his duties, and to direct in the discharge of the same."

Construing these general statutory provisions in connection with the incidental powers of corporations to which we have referred, this court has frequently, either expressly or impliedly, held that the various school boards and other educational authorities of the State have the power to adopt appropriate rules and regulations for the government of the schools under their control, and that when so adopted such rules and regulations are analogous to by-laws and ordinances, and are tested by the same general principles. *Danhoffer v. State*, 69 Ind. 295 (35 Am. R. 216); *State, ex rel., v. White, supra*; *State, ex rel., v. Webber*, 108 Ind. 31 (58 Am. R. 30).

The accepted doctrine is, that the general power to take charge of the educational affairs of a district or prescribed territory includes the power to make all reasonable rules and regulations for the discipline, government and management of the schools within the district or territory. *Thompson v. Beaver*, 63 Ill. 353; *Roberts v. City of Boston*, 5 Cush. 198; *Sherman v. Charlestown*, 8 Cush. 160; *People v. Medical Society*, 24 Barb. 570; *Spiller v. Woburn*, 12 Allen, 127; *Hodgkins v. Rockport*, 105 Mass. 475; *State v. Burton*, 45 Wis. 150 (30 Am. R. 706); *Ferriter v. Tyler*, 48 Vt. 444 (21 Am. R. 133).

But this does not imply that all the rules, orders and regulations for the discipline, government and management of the schools shall be made a matter of record by the school board, or that every act, order or direction affecting the conduct of such schools shall be authorized or confirmed by a formal vote. No system of rules, however carefully prepared, can provide for every emergency, or meet every requirement. In consequence, much must necessarily be left to the individual members of the school boards, and to the

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superintendents of, and the teachers in, the several schools. *Russell v. Lynnfield*, 116 Mass. 365.

It follows that any reasonable rule adopted by a superintendent, or a teacher merely, not inconsistent with some statute or some other rule prescribed by higher authority, is binding upon the pupils.

In the present case, the rule requiring the appellant to visit weekly all the schools under his charge and to see that the best methods of instruction were adopted, and which was read in evidence, necessarily conferred upon him authority, if authority had otherwise been wanting, to order and promulgate such additional rules as the best interests of the schools might seem to require, within the limits to which all such rules may extend.

As applicable to the structure and situation of the school-building which the appellee attended, and to the purposes designed to be accomplished by it, the rule requiring tardy pupils to remain either in the hall or in the principal's office until the opening exercises were over, was a reasonable rule, and one to which, as an abstract regulation, no serious objection can be urged.

Tardiness is a recognized offence against the good order and proper management of all schools. *Burdick v. Babcock*, 31 Iowa, 562. A tardy pupil ought not, therefore, to complain of some inconvenience or annoyance at having to remain in some other part of the building for the short period of time required to complete the opening exercises. But the manner of enforcing such a rule may, as in this case, cause a very different question to be presented. 2 Dillon Munic. Corp., section 950.

In the enforcement of all rules for the government of a school, due regard must be had to the health, comfort, age and mental as well as physical condition of the pupils, and to the circumstances attending each particular emergency.

More care ought to be observed in looking after the comfort of pupils, and especially those of tender age, in ex-

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extremely cold weather than when the atmosphere is nearer a mean temperature. Pupils known to have some mental or physical infirmity may require some relaxation in the strict enforcement of such rules as against them.

No rule, however reasonable it may be in its general application, ought to be enforced when to enforce it will inflict actual and unnecessary suffering upon a pupil. Rules are often adopted inflicting a penalty for absence from school without proper or some prescribed leave, and rules of that class have always, so far as our information extends, been held to be reasonable and sometimes necessary school regulations, and yet such rules could not be lawfully enforced against a pupil detained from school by sickness, a violent storm, a death in the family, or any physical disability to attend.

A school regulation must, therefore, be not only reasonable in itself, but its enforcement must also be reasonable in the light of existing circumstances. The habit of locking the doors of the school-room during the opening exercises observed by the appellee's teacher was not an unreasonable enforcement of the rule under consideration, in moderate weather and under ordinary circumstances. But to lock the doors on an extremely and unusually cold morning, without causing special care and attention to be given to the comfort of such pupils as might thereby be required to remain in some other part of the building, was undoubtedly both an unreasonable and a negligent, and hence an improper enforcement of the rule.

With these general principles in view, neither one of the instructions hereinabove set out can be sustained. They both utterly confounded the reasonableness of the rule to which they evidently referred as an abstract and general regulation, with its improper and unreasonable enforcement, and in effect submitted to the jury the reasonableness of the rule as a hypothetical question, dependent upon the existence or non-existence of certain enumerated facts. In other words, they

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both made the question of the validity of the rule one of mixed law and fact to be determined by the jury, instead of a question of law, as it really was, for the decision of the court.

The court also instructed the jury to the effect that if the appellee was at any time detained in the school-room for a period of ten or fifteen minutes after her class was dismissed, as a penalty for having asked leave to retire and having retired from the room during school hours, such detention was a false imprisonment, and that a teacher who might refuse to permit a pupil to retire from the school-room, in accordance with the rule set out in the third paragraph of the complaint, would be liable for whatever damages thereby resulted to the pupil.

In our view of the principles underlying this case, that instruction was also erroneous. Such a detention after the rest of the class was dismissed may have been unjust, in the particular instance, as well as in a general sense, to the appellee, and it, as well as the refusal of permission to retire, may have been a violation of the spirit of the rule referred to; but, upon the hypothesis stated in the instruction, the detention did not amount to a false imprisonment, and the refusal of permission to retire did not constitute a cause of action against the teacher.

The recognized doctrine now is, that a school officer is not personally liable for a mere mistake of judgment in the government of his school. To make him so liable it must be shown that he acted in the matter complained of wantonly, wilfully or maliciously. *Cooper v. McJunkin*, 4 Ind. 290; *Gardner v. State*, 4 Ind. 632; *Danenhoffer v. State*, 79 Ind. 75; *Elmore v. Overton*, 104 Ind. 548 (54 Am. R. 343); *Churchill v. Fewkes*, 13 Bradw. 520; *McCormick v. Burt*, 95 Ill. 263 (35 Am. R. 163); *Harman v. Tappenden*, 1 East, 555; *Dritt v. Snodgrass*, 66 Mo. 286 (27 Am. R. 343).

The instruction consequently fell short of telling the jury all that was necessary to establish a liability for either the detention or the refusal referred to by it.

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The detention or *keeping in* of pupils for a short time after the rest of the class has been dismissed, or the school has closed, as a penalty for some misconduct, shortcoming or mere omission, has been very generally adopted by the schools, especially those of the lower grade, and it is now one of the recognized methods of enforcing discipline and promoting the progress of the pupils in the common schools of the State. It is a mild and non-aggressive method of imposing a penalty, and inflicts no disgrace upon the pupil. The additional time thus spent in studying his lessons presumably inures to the benefit of the pupil. However mistaken a teacher may be as to the justice or propriety of imposing such a penalty at any particular time, it has none of the elements of false imprisonment about it, unless imposed from wanton, wilful or malicious motives. In the absence of such motives, such a mistake amounts only to an error of judgment in an attempt to enforce discipline in the school, for which, as has been stated, an action will not lie. And in this connection it is perhaps proper to say that there is nothing in the evidence, as we construe it, tending to show that the appellee's teacher was actuated by wantonness, wilfulness or malice in any of the alleged wrongs of which the appellee has complained. As there was a failure of proof as against the teacher, the necessary inference is that the evidence was insufficient to establish a cause of action against the appellant. As to what constitutes a reasonable rule for the government of a school, see the case of *Burdick v. Babcock*, 31 Iowa, 562, above cited.

The judgment is reversed, with costs.

Filed April 28, 1887.

ON PETITION FOR A REHEARING.

NIBLACK, J.—Rule 24 of this court provides that a “re-hearing must be applied for by petition in writing, setting forth the cause for which the judgment is supposed to be erroneous.” As applicable to that rule, see the cases of

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Goodwin v. Goodwin, 48 Ind. 584, and *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181.

The petition in this case fails to specify the particular causes, or any particular cause, on account of which the opinion heretofore announced is supposed to be erroneous, and hence does not comply with the rule in regard to rehearings above stated. An elaborate brief has, however, been filed in support of the petition, and as the case is, in many respects, one of public interest, we will nevertheless briefly consider some of the argumentative causes for a rehearing assigned by the brief.

It is claimed that the constructions we placed respectively upon the sixth and eighth instructions given by the circuit court are erroneous, because there is nothing either in the textbooks, or in any of the previously decided cases, which sustains the distinction recognized by us between the reasonableness of a rule adopted for the government of a public school and the unreasonable or improper enforcement of such a rule. This claim is based upon the alleged ground that such a rule to be valid must have a uniform and humane operation upon all alike, and must be of a character to restrain all school officers from inflicting cruelty or injustice on the one side, or from granting special indulgences to particular pupils on the other side, under its authority. We agree that such a school regulation must be operative on all alike; but by that is meant that it must apply to all alike under the same circumstances, that is, to all similarly situated. It is only in this sense that the most sweeping provisions of a statute can be made to have a uniform application. We have a statute which makes railroad companies liable for stock killed at places on their roads which are not securely fenced, and yet we have uniformly held that the provisions of that statute do not apply to places at which public policy does not permit fences to be erected. Under the strict letter of the statute, the deliberate and intentional killing of one person by another is murder, and

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yet, however deliberately and intentionally one may kill another in battle, the former stands excused by the unwritten, but higher, law of war. We might give many other illustrations of the flexibility of general as well as of positive statutes.

One of the most thoroughly established rules in the government of a school permits a teacher to punish a pupil for a violation of good order and necessary discipline, and the reasonableness of such a rule, as an abstract proposition, has never, as we are aware, been seriously questioned; but the nature and extent of the punishment which may be thus inflicted have always been made to depend upon the circumstances of each particular case. Cruel or excessive punishment has ever been construed to be both an unreasonable and an improper enforcement of this long established rule.

That abuses may be practiced in the pretended enforcement of a rule adopted for the government of a school, affords no argument against the reasonableness of the rule, having reference to the legitimate purposes for which it was adopted.

The distinction between the reasonableness of a school regulation, general in its character, and its negligent or improper enforcement, which we have attempted to define, however novel in form, is nothing more than a logical deduction from the general principles firmly and continuously recognized in the government of schools, and especially public schools. This view is amply sustained by the illustrations we have already given.

In answer to criticisms made upon our construction of some parts of the evidence, we need only state, in general terms, that we might well have contented ourselves with saying at the former hearing that, however much at fault the appellee's teacher may have been in regard to any of the matters complained of in the complaint, there was no evidence either showing, or fairly tending to show, that the appellant had any actionable connection with, or personal responsibility for, the mistakes or misconduct of the teacher touching such

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matters. Such was in effect our conclusion at the time, and nothing has been since adduced to change our conclusion in that respect; consequently, as the evidence did not make a case against the appellant, the appellee has no cause to complain of our view of the evidence in its abstract application to what may have occurred between her and her teacher.

Conceding our view of the evidence, in the respect last stated, to be erroneous, it does not affect the merits of the controversy between the appellant and the appellee. But, considering the immunity which the law extends to a teacher who acts in good faith and is impelled by proper motives in the government of his school, we see no reason to change our formerly intimated, if not expressed, opinion that the evidence would not have sustained an action against the appellee's teacher if she, instead of the appellant, had been the defendant.

Other questions are discussed by counsel, but nothing is offered which throws any new light upon the cause as it was originally presented.

On the general subject here discussed, further reference is made to 25 Central Law Journal, 339.

The petition for a rehearing is overruled.

Filed Nov. 5, 1887.

No. 13,162.

STRINGER v. MONTGOMERY ET AL.

CONVEYANCE.—*Trust.*—*Gift.*—*Recovery of Possession.*—*Quieting Title.*—Where the purchasers of land have the legal title conveyed to another, who pays no part of the consideration, the latter, in the absence of facts showing a gift of the property, becomes a trustee for the purchasers, and after a conveyance of the trust estate at the request of the beneficiaries, can not maintain an action to recover possession or quiet title.

SAME.—*Evidence.*—*Written Instruments.*—In such case it is proper to show

111	489
4156	63

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all the transactions between the parties, and the written instruments relating to the acquisition and disposition of the property are admissible in evidence.

SAME.--Married Woman.—Suretyship.—Trust Estate.—The conveyance by a married woman, to secure her husband's debt, of property held by her in trust for him, is not invalidated by the statute prohibiting her from entering into a contract of suretyship, as such statute applies only to property owned by her in her own right.

From the Hendricks Circuit Court.

T. E. Ballard, E. E. Ballard, S. M. Bruce and M. E. Clodfelter, for appellant.

E. C. Hogate, R. B. Blake and J. V. Hadley, for appellees.

ELLIOTT, J.—The questions which control this case arise on the facts stated in the special finding, and these facts may be thus summarized: The appellant's husband, Henry D. Stringer, and Bedford Shobe were partners doing business in Sedalia, Missouri, under the firm name of Stringer & Shobe. They were the owners, by a defective title, of a house and four lots in Sedalia, and one Mrs. Henry was the owner of a large tract of land in Monroe county, Missouri, which she proposed to exchange for the house and lots and a business block to be acquired by the firm. A contract was entered into between the parties wherein Mrs. Henry agreed that, in consideration of the payment to her of four thousand dollars in money and the conveyance of the house and lots and the business block in Sedalia, she would convey to Stringer & Shobe the land owned by her in Monroe county. In order to enable Stringer & Shobe to effect the exchange, it became necessary to raise \$10,800, for the purpose of paying for the business block, "to cover the house and four lots" and to pay Mrs. Henry the four thousand dollars agreed upon. Stringer & Shobe employed one J. R. Stewart to assist them in raising the money required, and agreed to pay him one-half of all the profits that might be realized. Stewart obtained from James C. Thompson a loan of the money, and it was agreed that, instead of one-half of the

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profits, the compensation should be twenty-five hundred dollars. Montgomery was employed to render services as an attorney, and it was agreed that he should receive one-third of the twenty-five hundred dollars as his compensation. The money was obtained on a mortgage executed on the Monroe county land, and both Stringer and Shobe were insolvent. Without any consultation with Mrs. Stringer, it was agreed that the title to the land should be placed in her name, but she paid no part of the consideration, and took no interest in the transaction beyond executing the necessary conveyances and papers. Pursuant to this agreement, deeds were executed and exchanged on the 26th day of June, 1883, and on that day three mortgages were executed on the Monroe county land, the first to T. W. Marshall for \$8,000, the second to John Montgomery, one of the appellees, for \$2,800, and the third was also executed to him to secure \$2,500. Some personal property was also purchased of Mrs. Henry by Stringer & Shobe. Possession of the Monroe county land was taken by them, and repairs were made with money received from rents.

On the 13th day of December, 1883, pursuant to an agreement between Stringer & Shobe and Montgomery and Thompson, the appellant and her husband conveyed, by a warranty deed, part of the Monroe county land to Lewis S. Watts, and received from Watts in exchange the property in controversy, situate in Danville, in this State. The sole consideration for the conveyance of this property was the conveyance of part of the Monroe county land, and the mortgages on that land were, by agreement of the parties interested, to be transferred to the property in Danville. The appellee Montgomery, in execution of this agreement, released his mortgages on that land and accepted mortgages on the Danville property, but the holder of the \$8,000 mortgage refused to transfer his mortgage security to Indiana.

In December, 1883, at the special request of Stringer & Shobe, the appellee Montgomery accepted a warranty deed,

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absolute on its face, for the Danville property, executed by the appellant and her husband. The consideration for the conveyance was the payment by Montgomery of encumbrances on the property, and of one hundred and fifty dollars in money, and the payment of certain debts owing by Stringer & Shobe. At the time this deed was executed an instrument in the nature of a defeasance was also executed. After the conveyance to him, Montgomery exchanged the property conveyed to him for a farm near Sedalia, Missouri.

It is stated in the special finding that "The plaintiff, Louisa Stringer, never put any money in the purchase of the real estate in controversy, nor did she pay any part of the consideration that purchased the property in Sedalia, or in Monroe county, Missouri."

Some other facts are stated in the special finding, but we have given a synopsis of enough of the finding to show very clearly that the trial court did not err in adjudging that the appellant can not maintain an action to quiet title to the real estate in controversy, or to recover possession of it.

It is apparent from the facts stated that the appellant received the property in trust for Stringer & Shobe, and that it was not conveyed to her in her own right. She paid no part of the consideration, and has no equities; for equity, when it can be done without violating some positive rule of law, regards the real and beneficial title as in the party who pays the purchase-money. Nor can the appellant be regarded as in any sense a purchaser, for she neither paid, nor promised to pay, any part of the consideration given for the property she now claims. Nor can she successfully claim that the property was a gift to her, for the facts conclusively show that the property was conveyed to her as a mere trustee. No act of Stringer & Shobe, nor of any one from the beginning to the end, indicates that anybody ever intended to make a gift to her; nor does any act of hers, until this action was brought, indicate that she supposed that the property was a gift to her. On the contrary, the acts done by her, and by all the parties

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interested, clearly show that the property was conveyed to her as a mere trustee. The claim of her counsel that the property was a gift is utterly without support.

The transaction constitutes a parol trust, and as that trust has been executed no possible question as to its validity can arise. *Hays v. Reger*, 102 Ind. 524. Mrs. Stringer has executed the trust by a conveyance of the property by a warranty deed, and in equity, as in common fairness, she is concluded from attempting to regain the property.

Counsel affirm that there can be no trust because there is no beneficiary, but in this they are plainly in error. Stringer & Shobe are the beneficiaries. They paid the consideration for the property, and in equity they are the owners of it. They were the beneficiaries at the outset, and that position has not been changed. They certainly never made any gift to the appellant, and she, surely, never bought from them. As she neither bought the property nor was a donee, it is impossible to perceive how she has any title.

If she has no title she can not maintain an action to quiet title or to recover possession, for she must recover, if at all, upon the strength of her own title. It is unnecessary, therefore, to search for a beneficiary, since, if she has not the title, she must fail wherever else the title may be; but there is no real difficulty, as we have seen, in determining who the beneficiaries are.

It is clear to our minds that Mrs. Stringer became a trustee, and that, as she conveyed the trust estate to Montgomery at the request of the beneficiaries, she no longer has any title to the property, whatever may be the rights of Montgomery.

We do not think the special finding is so defective as to entitle the appellant to a *venire de novo*. There is, perhaps, some evidence stated in it, but there are enough material facts to sustain the conclusion of law and the judgment of the court.

It is not here a question whether Montgomery can be

called to account if he is guilty of a breach of duty under his contract, but the question is, has the appellant such a title as will enable her to maintain an action to recover possession or quiet title? We think the facts found show that she has not, for they show that the legal title to the trust estate has been conveyed by her, and this is enough to defeat her action.

It was proper to show all the transactions between the parties, and there was no error in admitting in evidence all the written instruments relating to the acquisition and disposition of the property.

It is said, in discussing the motion for a new trial, "that the instruments under which the appellee claims title were made by appellant to secure her husband's debts, and for no other purpose," and from this premise it is concluded that they are void. The fallacy in this argument is the undue assumption that she owned the property, whereas the truth is she was not the owner of the property in the sense contemplated by the statute, but simply held it in trust. The statute concerning married women does not, of course, apply to property held in trust for the benefit of another person. It only applies to property which the married woman owns in her own right.

Judgment affirmed.

Filed June 15, 1887; petition for a rehearing overruled Sept. 21, 1887.

111	494
114	302
111	494
131	196
132	330
111	494
150	102

No. 12,980.

GARDNER v. CASE ET AL.

MARRIED WOMAN.—*Mortgage.*—*Surety.*—*Statute of 1879.*—Under the statute of 1879 (Acts of 1879, p. 160), a married woman might mortgage her separate property, acquired by purchase, to secure her husband's debt. **SAME.**—*Duress by Husband.*—*Knowledge of Mortgagee.*—It is no defence to a suit to foreclose a mortgage against a married woman that the latter

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executed the mortgage under duress by her husband, unless the mortgagee participated in or had knowledge of the duress.

PLEADING.—*Additional Answers.*—*Refusal to Allow Filing of.*—*Discretion of Trial Court.*—For facts held not sufficient to show an abuse of discretion by the trial court in refusing to allow an additional paragraph of answer to be filed, see opinion.

SPECIAL FINDING.—*Exception to.*—*Practice.*—*Motion for New Trial.*—A simple exception to a finding of facts does not raise a question as to whether the finding is in accordance with or contrary to the evidence, but a motion for a new trial is necessary.

SAME.—*Exception to Conclusions of Law.*—*Admission.*—An exception to conclusions of law admits, for the purposes of the exception, that the facts have been fully and correctly found.

From the Huntington Circuit Court.

J. M. Hildebrand, J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellant.

W. H. Trammel, for appellees.

ZOLLARS, C. J.—Appellees brought this suit against appellant and her husband to foreclose a mortgage executed by them in July, 1880.

It is insisted here that the court below erred in refusing leave to appellant to file amended and additional answers.

As to the first and second answers tendered, it will not be necessary for us to decide whether or not appellant was chargeable with such laches as justified the court in refusing leave to file them. There was no available error in the refusal, for the sufficient reason that the facts set up in those answers were insufficient as defences to the action, and hence the answers could have been of no avail to appellant had they been filed.

It is apparent that the purpose of the pleader in drafting the first answer so tendered, was to bring the case within the statute of 1879, which was in force at the time the mortgage was executed, and which provided that a married woman should not mortgage her separate property, acquired by descent, devise or gift, as a security for the debt or liability of her husband, or any other person. Acts 1879, p. 160.

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It was alleged in the first answer so tendered, that the mortgage in suit was given to secure a debt of appellant's husband and co-defendant; that she was his wife at the time the mortgage was executed, and continued to be at the time the answer was tendered; that the real estate mortgaged was her separate property, purchased by her with money which came to her from her father's estate, and with money given to her by her husband.

The answer thus shows that the land mortgaged was acquired by purchase, and not by descent, devise or gift. The land having been thus acquired, the mortgage was neither void nor voidable under the statute of 1879. In support of these conclusions it is not necessary to do more than cite our cases. *Orr v. White*, 106 Ind. 341; *Frazer v. Clifford*, 94 Ind. 482.

In the second answer tendered it was averred that appellant executed the mortgage under duress by her husband. The answer was insufficient, for the reason that it contained no averment that appellees were in any way connected with, or had any knowledge of, the duress. *Line v. Blizzard*, 70 Ind. 23; *Green v. Scranage*, 19 Iowa, 461; *Talley v. Robinson*, 22 Gratt. 888.

We are not convinced that the court below abused its discretion in refusing to allow the third answer tendered to be filed.

The suit was commenced in March, 1883. A decree of foreclosure was rendered upon default. The decree and default were subsequently set aside, and at the March term, 1884, of the court, appellant filed an answer in one paragraph. To that answer, after a portion of it had been stricken out, appellees filed a reply in denial. Some days subsequently appellant tendered the first and second answers above mentioned. On the 2d day of January, 1885, in the December term, 1884, of the court, appellant tendered a third answer, denying the execution of two of the notes secured by the

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mortgage. The answer was accompanied by her affidavit. In that affidavit, sworn to on the 31st day of October, 1884, she stated that the two notes had been altered, and that she had no knowledge of such alteration until during, or subsequent to, the preceding June term of the court, when her attention was called to the notes by her attorney. At the March term, 1885, an affidavit by one of appellant's attorneys was presented in support of her motion for leave to file the answer. In that affidavit the attorney stated that he had been her attorney since January, 1884, and discovered the alteration in the notes (at what time he made the discovery was not stated); that he regarded the alteration as material, and intended to call appellant's attention to the fact, but forgot to do so during the March term, 1884, of the court, by reason of sickness which rendered him unable to attend court during a considerable portion of that term, and unfitted him to properly attend to business; that at the June term, 1884, he again forgot to call appellant's attention to the alteration, for the reason that a member of his family was sick, and required his personal attention about all the time, so that he was unable to attend to business; that soon after that term he called appellant's attention to the alteration, when she informed him that she desired the fact to be pleaded as a defence; that Mr. Branyan had been an assistant attorney in the case since the March term, 1884, but was not familiar with the case, and that his attention had not been called to the alteration of the notes until the December term, 1884.

It will be noticed that the affidavit of the attorney contained no excuse for not informing appellant and the assistant attorney of the alteration in the notes, between the March and June terms of the court in 1884, and that no excuse was given by either appellant or her attorneys for not presenting the answer during the October term, 1884.

At the request of appellant the trial court made a special finding of facts, with conclusions of law thereon.

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It found that the debt secured by the mortgage was the debt of the appellant's husband, and that she mortgaged her separate real estate for the security of that debt, but did not find by what method she acquired the property, whether by purchase, descent, devise or gift.

Appellant excepted to the finding of facts, and now insists that, upon the evidence, the court should have found that she acquired the property by descent and gift. The exception can be of no avail to appellant for two reasons. In the first place, under the pleadings, there was no issue requiring a finding as to the ownership of the property. *Thomas v. Dale*, 86 Ind. 435.

In the second place, a simple exception to a finding of facts does not raise the question as to whether or not the finding is in accordance with, is sustained by, or is contrary to, the evidence. Those questions must be raised by a motion for a new trial. *Ex parte Walls*, 73 Ind. 95; *Western Union Tel. Co. v. Brown*, 108 Ind. 538; *Dodge v. Pope*, 93 Ind. 480.

Upon the facts found, the court determined as a matter of law that the mortgage was a valid and subsisting lien upon the real estate. To that conclusion of law appellant excepted.

It is well settled that an exception to conclusions of law, for the purpose of the exception, admits that the facts have been fully and correctly found. *Wynn v. Troy*, 109 Ind. 250; *Bass v. Elliott*, 105 Ind. 517; *Helms v. Wagner*, 102 Ind. 385.

Upon the facts found, so far as they are within the issues, the conclusion of law by the court below, that the mortgage was a valid and subsisting lien upon the real estate, is correct.

As before stated, appellant confessed a motion to strike out a portion of her answer filed in March, 1884. That confession carried out of the case all averments as to the ownership of the property mortgaged. Therefore, the finding in

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general terms that the real estate belonged to appellant must be disregarded. *Thomas v. Dale*, 86 Ind. 435; *Bixel v. Bixel*, 107 Ind. 534.

Judgment affirmed, with costs.

Filed Sept. 20, 1887.

No. 13,310.

TROUT v. THE STATE.

CRIMINAL LAW.—Lottery.—Sale of Share or Chance in.—Information.—Sufficiency of.—An information charging the sale of a share or chance in a lottery scheme or gift enterprise, substantially in the language of section 2077, R. S. 1881, defining the offence, is good on motions to quash and in arrest of judgment.

SAME.—Repugnant Allegations.—Surplusage.—Motions to Quash and in Arrest.—Contradictory and repugnant allegations in an information, unless containing matter which, if true, constitutes a legal bar to the prosecution, will be regarded as surplusage and afford no ground for quashing the information, where the offence is charged therein with sufficient certainty.

SAME.—Weight of Evidence.—A verdict will not be disturbed on the weight of the evidence.

From the Marion Criminal Court.

J. N. Scott, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

Howk, J.—In this case appellant was prosecuted and convicted upon affidavit and information for the unlawful sale of a share in a lottery scheme and gift enterprise. From the judgment of conviction he has appealed to this court, and has here assigned errors which call in question the overruling (1) of his motion to quash the information, (2) of his motion for a new trial, and (3) of his motion in arrest of judgment.

111	499
111	556
111	599
112	113
113	509
114	546
116	114
111	499
124	367
127	226
111	499
136	369
111	499
139	45
139	533
111	499
141	111
111	499
147	78
147	219
111	499
159	213
111	499
170	479

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Of these alleged errors the first and third will be considered together, as they each present the single question of the alleged insufficiency of the facts stated in the affidavit and information herein to constitute a public offence.

It was charged, substantially, in the affidavit and information that, on November 17th, 1885, at and in Marion county, appellant unlawfully sold to John W. Page for the sum of ten cents, then and there paid by Page to appellant, one share, chance and opportunity to draw in a certain lottery scheme and gift enterprise for the division of personal property, to wit, certain sums of lawful money of the United States, to be determined by chance and lot, which said sums of money and a particular description thereof were to affiant unknown, and, therefore, could not be given ; and the plan and scheme for the division and distribution of such sums of money, by said lottery scheme and gift enterprise, were to affiant unknown, and could not be given ; and the mode of operating and conducting such lottery scheme and gift enterprise, and the name and style and a more particular description thereof, were unknown to affiant, and, for that reason, could not be given ; that, as a part of such lottery scheme and gift enterprise, appellant permitted said Page, in consideration of the aforesaid sum of ten cents so paid to appellant as aforesaid, to select any three numbers from a large number of numbers designated by appellant, and in the event two of the three numbers, so selected by said Page, were drawn, designated and selected by the managers and operators of such lottery scheme and gift enterprise, said Page would be entitled to a large share of money, to wit, the sum of forty-six cents, of the sum of money to be divided as aforesaid by the managers and operators of such lottery scheme and gift enterprise as aforesaid ; and in the event two of such three numbers were not drawn, designated and selected by said managers and operators, then the said Page would not receive any part or share whatever of said sum of money ; that thereupon, said Page then and there selected and designated the numbers 3-19-67, from

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said large number of numbers, and then and there paid appellant for the share and chance aforesaid the sum of ten cents as aforesaid; and according to the plan and scheme of said lottery scheme and gift enterprise, said numbers 3-19-67 entitled said Page, the purchaser thereof, to the sum of forty-six cents of the sum of money to be so divided as aforesaid, in case two of the three of said numbers were drawn, designated and selected from a large number of numbers by the managers and operators of said lottery scheme and gift enterprise; and in case two of said numbers 3-19-67, so purchased as aforesaid, were not drawn, designated and selected as aforesaid by the managers and operators of such lottery scheme and gift enterprise, then, and in that event, said Page would not be entitled to and would not receive any part or share of the money to be so divided by chance and lot by the managers and operators of said lottery scheme and gift enterprise as aforesaid.

From the facts stated and recited in the affidavit and information herein, the substance of which we have given, it is manifest that it was intended to charge appellant therein and thereby with the offence against public policy which is defined, and its punishment prescribed, in section 2077, R. S. 1881.

That section reads as follows: "Whoever sells a lottery ticket or tickets or share in any lottery scheme or gift enterprise; or acts as agent for any lottery scheme or gift enterprise; or aids or abets any person or persons to engage in the same; or transmits money by mail or express, or otherwise transmits the same, to any lottery scheme or gift enterprise for the division of property, to be determined by chance; or makes or draws any lottery scheme or gift enterprise for a division of property not authorized by law,—on conviction thereof, shall be fined in any sum not more than five hundred dollars nor less than ten dollars."

With the statute defining the offence charged and the foregoing summary of the facts stated in the affidavit and infor-

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mation herein before us, we proceed now to the consideration of the objections urged by appellant's learned counsel to the sufficiency of such affidavit and information.

Counsel vigorously contends that appellant's motion to quash the information herein ought to have been sustained by the trial court, for the following reasons, namely :

"1. Because the acts charged do not constitute a public offence.

"2. Because the information does not charge the offence with sufficient particularity and certainty.

"3. Because the allegations of the information are contradictory and repugnant."

In discussing together the first two of these reasons, appellant's counsel insists that the information is bad, in that it charges merely conclusions in regard to the lottery scheme mentioned therein, and does not state "the process by which the result was to be determined." Counsel says: "The appellant was entitled to know this, in order that he might properly prepare his defence. The court was entitled to know it, in order that it might be able to determine whether it was an offence—whether the process was such as constituted a lottery."

It is no doubt true that an information or indictment, under our criminal code, must state "with sufficient certainty" the facts constituting the offence intended to be charged, or it must be held bad on motion to quash. Section 1759, R. S. 1881; *Trout v. State*, 107 Ind. 578.

Under our decisions, as a general rule, an indictment or information will be sufficient to withstand a motion to quash if it charge the offence in the language of the statute, or in terms substantially equivalent thereto. *Howard v. State*, 87 Ind. 68; *State v. Miller*, 98 Ind. 70; *Ritter v. State*, ante, p. 324.

It is conceded by appellant's counsel in the case under consideration, that the offence is charged "substantially in the words of the statute." But counsel claims this is not

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sufficient in this case. The statute does not define the offence by setting out particularly the facts constituting it. "If it had so defined the offence," counsel says, "an information simply following the words of the statute might have been sufficient."

It is very clear, we think, that appellant's counsel wholly misapprehends the force and effect of the language of the section of the statute heretofore quoted in this opinion. In words of no uncertain meaning, the statute clearly defines the offence charged, and intended to be charged, in the information, the substance of which we have heretofore given. "Whoever sells a lottery ticket or tickets, or share in any lottery scheme or gift enterprise," says the statute, "on conviction thereof shall be fined," etc. The information herein charged that on, etc., at, etc., appellant unlawfully sold to John W. Page, for a specified sum of money then and there paid, "one share, chance and opportunity to draw in a certain lottery scheme and gift enterprise," for the division of certain sums of lawful money to be determined by chance and lot, etc. The offence is charged in the information herein substantially in the language of the statute, and, we think, with sufficient certainty. *Ritter v. State, supra*.

But appellant's counsel further insists that the information ought to have been quashed, because the allegations thereof were "contradictory and repugnant." It is not claimed by counsel, however, that the information herein "contains any matter which, if true, would constitute a legal justification of the offence charged or other legal bar to the prosecution." Section 1759, *supra*. Any other contradictory and repugnant matter would afford no ground for quashing the information, where, as here, the offence is charged therein with sufficient certainty, but must be regarded as at most mere surplusage.

For the reasons given we are clearly of the opinion that the trial court did not err in overruling either the motion to

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quash the information herein, or the motion in arrest of judgment.

Under the alleged error of the court below in overruling appellant's motion for a new trial herein, his counsel insists that the verdict of the jury was not sustained by sufficient evidence. We can not disturb the verdict on the evidence. There is evidence in the record which fairly tends, we think, to sustain the verdict on every material point. In such case it is settled by our decisions that, even in a criminal cause, the judgment will not be reversed on the evidence. *Garrett v. State*, 109 Ind. 527. The supposed variance between the allegations of the information and the evidence is not worthy of serious consideration. The variance was wholly immaterial. There was no error, we think, in the overruling of appellant's motion for a new trial.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Sept. 20, 1887.

No. 12,723.

OTIS v. GREGORY.

QUIETING TITLE.—*Complaint.*—*Necessary Allegations.*—A complaint to quiet title must show, either by direct averment or by the statement of facts from which the inference necessarily arises, that the defendant's claim is adverse, or unfounded, and a cloud upon the plaintiff's title.

MORTGAGE.—*Cancellation.*—*Equitable Defences.*—*Maxim,* "He Who Seeks Equity Must do Equity."—*Application of.*—A plaintiff who shows himself otherwise entitled to the aid of a court of equity will not, under the maxim that he who seeks equity must do equity, be denied relief, unless the defendant brings forward some corresponding equity, growing out of the subject-matter then in suit, which would, at some time subsequent to the transaction, in some form of proceeding, entitle him to a remedy against the other party, in respect to the subject-matter involved.

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SAME.—*Married Woman.*—*Mortgage Without Husband Joining.*—*Lex Situs.*—*Vendor's Lien.*—*Pleading.*—*Practice.*—A mortgage executed in Michigan by a married woman, without her husband joining, upon her separate land in this State, is void, and, of itself, creates no equity which the courts can recognize; but if the debt intended to be secured thereby is purchase-money, the mortgagee may, by reason of his vendor's lien, in a proceeding by the mortgagor to cancel the mortgage, obtain affirmative relief by cross-complaint, or by setting up the facts by way of answer may, unless his equity is acknowledged, defeat the plaintiff's right to relief.

SAME.—*Vendor's Lien.*—*Equitable Subrogation.*—Where a party who holds a valid mortgage upon land releases it, in order that the owner may sell the property and invest the entire proceeds in another tract, he to take a mortgage upon the latter for the amount of his debt, he in effect pays a part of the purchase-money, and, if the mortgage taken is void, will be subrogated to that extent to the rights of the vendor.

From the LaPorte Circuit Court.

D. J. Wile, F. E. Osborn and J. B. Langworthy, for appellant.

M. Nye, for appellee.

MITCHELL, J.—This was an action by Mary E. Gregory against Amos Otis to quiet title to real estate. The plaintiff alleged that she was the owner, in fee-simple, of a certain particularly described tract of land in LaPorte county, and that the defendant had, or claimed to have, some interest in or claim to the same, or some part thereof, of the nature of which she averred she was not advised. She alleged that the defendant was giving out to the public that he had some claim to the real estate described, by reason of which she was damaged, in that it prevented her from making sale of her land. Prayer that the plaintiff's title might be quieted, and for all other proper relief.

The foregoing summary of the complaint discloses, that neither directly nor by necessary inference does it appear that the defendant was asserting any hostile or adverse title to the real estate in question, nor does it appear that the claim which the defendant was setting up was unfounded and cast a cloud upon the plaintiff's title. Admitting every

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averment in the complaint to be true, there is nothing to invoke the jurisdiction of a court of equity to quiet the plaintiff's title. For all that appears, the defendant may have had a valid mortgage on the land, and this may have presented the only obstacle to the sale of the real estate.

It has often been held, and the rule is uniform, that, although the plaintiff in an action to quiet title need not state in his complaint with much particularity the nature of the title or interest claimed by the defendant in or to the real estate in controversy, the complaint must show, either by direct averment or by the statement of facts from which the inference necessarily arises, that the defendant's claim is adverse to, or is unfounded and a cloud upon, the plaintiff's title. *Second Nat'l Bank v. Corey*, 94 Ind. 457; *Conger v. Miller*, 104 Ind. 592; *Rausch v. Trustees, etc.*, 107 Ind. 1.

The complaint in the case before us can not be distinguished from that in *Second Nat'l Bank v. Corey, supra*. The conclusion follows that the assignment of error, that the complaint does not state facts sufficient to constitute a cause of action, is well made.

As it may serve to bring the controversy between the parties to a conclusion, we will consider the questions made upon the answer to which the court sustained a demurrer. Without having made any question upon the complaint, the defendant answered, in substance, that in the year 1873 the plaintiff was a married woman, residing in the State of Michigan, and the owner in her own right of certain real property in that State. That by the statute of the State of Michigan (which is set out in the answer), married women are empowered to contract with reference to, and to convey and mortgage, their separate real estate in all respects as if they were unmarried. It is averred that on the 15th day of October, 1873, the plaintiff and her husband became indebted to the defendant in the sum of four hundred and sixty dollars. This indebtedness was secured by a mortgage executed by the plaintiff on her separate property in Michigan. After-

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ward, in June, 1874, the plaintiff sold her Michigan property and purchased that in question in LaPorte county. To enable her to make the purchase, it became necessary that she should be able to use the entire purchase-money arising from the sale of the Michigan property, including the amount due the defendant on his mortgage debt. The defendant agreed that he would release his mortgage on the property in Michigan, and permit the plaintiff to use the amount due him in paying the purchase-money of the LaPorte county property, she agreeing to give him a mortgage on the latter when the transaction should be completed. The defendant released his mortgage accordingly, and took a mortgage, executed by the plaintiff, without the joinder therein of her husband, upon the property described in the complaint. Mrs. Gregory paid for the property purchased with the proceeds of that sold. This last mortgage, it is averred, was executed in the State of Michigan, both parties believing in good faith at the time, that the law of Indiana, as in Michigan, empowered a married woman to encumber her separate real estate without the joinder of her husband. But for such belief, the defendant says he would not have released his mortgage on the Michigan property and received that on the property in Indiana.

It appears that the only interest which the defendant claims in the land in question is such as results from the foregoing facts. It further appears that the only purpose of this action is to secure a cancellation of the mortgage thus taken, and a removal of the apparent cloud or encumbrance which it casts upon the plaintiff's title.

The appellant claims that the circumstances are such as that it would be inequitable to cancel his mortgage, without first requiring payment of the debt which it was intended to secure, or otherwise placing him in as favorable a position as he would have occupied in case he had received a valid mortgage. In other words, his position is, since Mrs. Gregory has come into a court of equity, asking its aid to cancel an alleged invalid mortgage, which was made and received in

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good faith, she must accept the aid of the court in subordination to the maxim, "He who seeks equity must do equity." That this maxim, in its true spirit and purpose, expresses the principle which lies at the foundation of all equity proceedings, guiding and governing courts of equity at every stage in the administration of justice, is one of the distinguishing excellencies underlying all chancery jurisdiction. Pom. Eq. Jur., sections 120, 363.

In a court of equity the principle thus expressed is as authoritative as though it were enacted into positive law. In its proper sense it is a universal rule, binding upon parties and courts in all controversies in which complete justice can only be accomplished by its application, within reasonable and recognized rules.

Plowden, speaking of the quality of maxims, in *Colthirst v. Bejushin*, 1 Plow. 21, 27, says: "Further, there are two principal things from whence arguments may be drawn, that is to say, our maxims, and reason, which is the mother of all laws. But maxims are the foundations of the law, and the conclusions of reason, and therefore they ought not to be impugned, but always to be admitted; yet these maxims may by the help of reason, be compared together, and set one against another (although they do not vary), where it may be distinguished by reason that a thing is nearer to one maxim than to another, or placed between two maxims; nevertheless they ought never to be impeached or impugned, but always be observed and held as firm principles and authorities of themselves."

Accepting the maxim above referred to as in the highest degree authoritative, it becomes proper to inquire concerning the manner of its application in the practical adjustment of controversies between parties.

What is the "equity" which a party appealing to a court of chancery must do before he is entitled to relief? Can a party who becomes plaintiff in a court of equity be compelled, as the price of the relief demanded, to surrender to the de-

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fendant something which the latter could not have compelled by some proceeding, either at law or in equity, in case the former had not appealed to the court? If he can, then the rule that he who would have equity must do equity depends for its application in each case upon the arbitrary notions of the chancellor concerning the equities between the parties. The effect of such an application of the rule would inevitably, in many cases, be to refuse aid to which a plaintiff would be entitled, except upon condition that the latter should concede to the defendant some supposed equitable right which was not enforceable at law or cognizable in a court of equity, and, hence, not within any description of a legal or equitable right.

So far as any general rule on the subject can be laid down, it may, with assurance, be stated, that a plaintiff, who shows himself otherwise entitled to the aid of a court of equity, will not be denied relief, unless the defendant brings forward some corresponding equity, growing out of the subject-matter then in suit, which would at some time subsequent to the transaction, in some form of proceeding, entitle him to a remedy against the other party in respect to the subject-matter involved. It can not be maintained in reason that a defendant, to whom the plaintiff is under some imperfect obligation of a merely moral character, which never had ripened, and never could ripen into an enforceable legal or equitable right, may nevertheless, for some merely sinister purpose, defeat an equity to which a plaintiff is entitled. If the defendant, at no time subsequent to the transaction which formed the subject-matter of the plaintiff's bill, had, and could not thereafter acquire, in respect to that transaction, any right to relief, cognizable in a court of equity or otherwise, no reason is perceived why the plaintiff should be denied an equitable remedy to which he would otherwise be entitled. As was said by the learned vice-chancellor, in *Hanson v. Keating*, 4 Hare, 1: "The court can never lawfully impose merely arbitrary conditions upon a

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plaintiff, only because he stands in that position upon the record, but can only require him to give the defendant that which by the law of the court, independently of the mere position of the parties on the record, is the right of the defendant in respect of the subject of the suit." Or, as the same learned judge said in *Neesom v. Clarkson*, 4 Hare, 97, 101: "I think it may be generally said, that, unless the equity which the defendant claims from the plaintiff is one which the defendant might enforce by bill, it is not a term which the court has a right to impose on the plaintiff." It may be admitted that there are cases which do not seem to fall within the foregoing general principles; but such cases must be regarded as of a special and exceptional character. Pom. Eq. Jur., sections 385, 386. The general doctrine as stated in *Hanson v. Keating*, and *Neesom v. Clarkson*, *supra*, meets the approval of our judgment.

It should be observed that the rule embraces and applies only to the one matter which is the subject of the suit, and not to distinct transactions having no proper relation to nor connection with the subject-matter of the action. The plaintiff who seeks the aid of a court of equity, must submit to the condition that all corresponding equities of the character above described, in favor of the defendant, growing out of the subject-matter or transaction involved in the suit, may be fully and finally adjusted. *Tuthill v. Morris*, 81 N. Y. 94, 100.

With the foregoing principles in view, we proceed to consider the equities of the respective parties to the record. Since conveyances and mortgages of real estate take effect according to the law of the place where the land conveyed or mortgaged is situate, it follows, regardless of the intention or good faith of the parties, that the law of this State must determine the validity of the mortgage which is sought to be cancelled. *Freeland v. Charnley*, 80 Ind. 132; *Bethell v. Bethell*, 92 Ind. 318; *Swank v. Hufnagle*, *ante*, p. 453; 1 Jones Mort., section 823.

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The statute of Indiana, touching the marriage relation, in force at the time the mortgage in question was executed, provided that a married woman should have no power to encumber or convey her land, except by deed in which her husband should join. 1 R. S. 1876, 550 (section 5117, R. S. 1881).

Since the only power of married women to convey or encumber their real estate is derived from the statute, it follows necessarily that the separate deed of the wife, purporting to mortgage her land within this State, was absolutely void. *Mattox v. Hightshue*, 39 Ind. 95; *Scranton v. Stewart*, 52 Ind. 68. It was without legal force, and of itself created no equity which the courts can recognize or protect. As was said in *Baxter v. Bodkin*, 25 Ind. 172: "In the nature of things, it must be impossible for a right in equity to arise out of an instrument which binds nobody." *Luntz v. Greve*, 102 Ind. 173, 183; *Hamar v. Medsker*, 60 Ind. 413, and cases cited; *Abdil v. Abdil*, 26 Ind. 287; *Williams v. Wilbur*, 67 Ind. 42.

The invalidity of the mortgage having arisen out of a want of capacity to make the instrument, a court of equity is powerless to afford the defendant any aid in respect to the invalid instrument. *Glidden v. Strupler*, 52 Pa. St. 400. The case stands as if no mortgage had ever in fact been attempted, so far as the appellant is concerned. Whatever may have been formerly held in other jurisdictions in respect to the cancellation of void contracts, the doctrine that a party to an instrument, which is of no legal force or validity whatever, may ask the aid of a court of equity in procuring its surrender and cancellation, is now fully set at rest here. It is regarded as against conscience, that one party should persist in holding a deed or other instrument against another of which he can make no possible use except as a means of embarrassing his adversary. *Huston v. Roosa*, 43 Ind. 517; *Hardy v. Brier*, 91 Ind. 91; 1 Story Eq. Jur., section 700; 3 Pom. Eq. Jur., section 1377.

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The mortgage in question, although absolutely void, was, nevertheless, an apparent cloud or encumbrance on the plaintiff's title. She had, therefore, a clear equitable right to invoke the aid of the court to procure its cancellation. This was the appellee's equity; it was the equity which she sought the aid of the court to enforce. The mortgage which the plaintiff sought to have cancelled grew out of a transaction in which the appellant undertook to aid her in purchasing the land covered by the void mortgage. The subject-matter of the suit, therefore, comprehended and brought within the jurisdiction of the court the entire transaction. When a court of equity once obtains rightful jurisdiction of a subject-matter, it avails itself of the opportunity to investigate and decide all incidental matters necessary to enable it to make a full and final determination of the whole controversy. With the equities of the plaintiff, it settles any and all legal or equitable rights of the defendant pertaining to the same subject-matter, and thus avoids a multiplicity of suits. *Souder's Appeal*, 57 Pa. St. 498.

Taking the facts put forward in the answer as true, has the appellant any equity within the principles already laid down which the court may require the appellee to recognize, as a condition upon which it will afford her the relief to which we have seen she is entitled? Has the appellant an equitable right, upon the facts stated in his answer, to maintain a bill to declare and enforce a lien against the appellee's LaPorte county property? If he has, the maxim "He who seeks equity must do equity" imperatively requires that relief be denied the plaintiff, except upon condition that she consent that the decree shall also adjust the corresponding equities of the appellant. That the appellant has a right, cognizable in a court of equity, growing out of the transaction involved in the suit, is demonstrable upon authorities which leave the subject in no sort of doubt.

A vendor's lien for unpaid purchase-money will be declared and enforced against property purchased and held by a mar-

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ried woman precisely as in the case of a person who is under no legal disability. *Perry v. Roberts*, 30 Ind. 244; *Haugh v. Blythe*, 20 Ind. 24; *Huffman v. Cauble*, 86 Ind. 591; *Martin v. Cauble*, 72 Ind. 67; *Haskell v. Scott*, 56 Ind. 564.

The substance of the transaction between Mrs. Gregory and the appellant was that the former became indebted to the latter for a specified amount of the purchase-money due on the LaPorte county land, for which indebtedness the appellant received no security. If, at the time Mrs. Gregory sold her Michigan property, she had paid the appellant the amount of his secured debt, and the latter had at her request applied the money so paid upon the purchase price of the LaPorte county land, it is clear, upon authority, that, as between the parties, a vendor's lien would have resulted by implication of law in favor of the appellant. Substantially, that was the nature of the transaction. As we said, in effect, in the recent case of *Barrett v. Lewis*, 106 Ind. 120, the lien which arises in favor of the person to whom purchase-money is due is peculiarly of equitable cognizance. Equity has regard in such cases, as in others, for the substance, and not for the mere form. If, upon looking through the transaction, it appears that the debt which the party owes is in fact part of the purchase price of land, acquired in the transaction out of which the debt arose, a lien will be declared upon the land in favor of the person to whom such debt is due. The substance of the arrangement between the parties here concerned was, as the admitted facts made it appear, that Mrs. Gregory and her husband owed the appellant a debt which amounted to five hundred dollars. This debt was secured by a mortgage, which created a valid encumbrance upon her property in Michigan. She sold the Michigan property and desired to purchase property in Indiana; but to enable her to make the purchase, it became necessary that she should realize the full amount of the price at which she sold the property in Michigan. It was, therefore, agreed that the

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appellant should release his mortgage on the property sold, so as to enable the appellee to receive the whole of the purchase-money, which was to be applied in payment of the property purchased, so that, instead of owing her vendor part of the purchase price, she would owe the appellant the amount which he had in effect paid, or transferred to her to be paid, on the LaPorte county land.

In the case of *Austin v. Underwood*, 37 Ill. 438, it was held that where a party purchases land and procures the purchase-money to be paid by a third person as a loan to the purchaser, the money thus loaned will be regarded as purchase-money as against the person for whom it was paid. *Magee v. Magee*, 51 Ill. 500; *Carey v. Boyle*, 53 Wis. 574; *Jones v. Parker*, 51 Wis. 218; *Carey v. Boyle*, 56 Wis. 145. The lien in such a case results from the transaction between the parties, and is manifested by all the circumstances attending each particular case.

The controlling question in cases of this character is, whether or not the debt owing is, as to the debtor, the balance due for purchase-money. *Barrett v. Lewis, supra*; *Boyd v. Jackson*, 82 Ind. 525; *Nichols v. Glover*, 41 Ind. 24.

In the case of *Dwenger v. Branigan*, 95 Ind. 221, the facts were, that one party furnished the other fifteen hundred dollars in money for the purpose of paying the purchase price of certain real property, it being agreed at the time that the party furnishing the money should have a lien on the land purchased. A vendor's lien was declared in favor of the person furnishing the money. The principle which ruled that case fully sustains our conclusion here. The appellant having, at the appellee's request, in effect paid five hundred dollars of the purchase-money for her under an agreement that he was to hold a lien upon the land purchased, although the particular lien contemplated has miscarried, he will be subrogated by a court of equity to the rights of the vendor who received his money.

Equitable subrogation is the creature of courts of equity,

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and obtains regardless of any contractual relations between the parties to be affected by it. Courts of equity administer its principles whenever it is necessary to secure substantial justice, without regard to form. This is the appellant's equity. Before the appellee can have the relief which she demands, she must recognize the corresponding equity of the appellant. "It is always incumbent upon the party asking the interposition of a court of equity in his behalf, to show a perfect equity." *Piatt v. Smith*, 12 Ohio St. 561; *Hill v. Nisbet*, 100 Ind. 341. Of course, upon the answer as it is pleaded, the appellant can have no affirmative relief. Such relief can only be obtained by setting up the facts by way of cross-complaint. But a defendant is not compelled to become an actor and ask affirmative relief. He may rely upon the facts as an equitable defence to defeat his adversary's claim. *East v. Peden*, 108 Ind. 92.

Our conclusion is, that the facts pleaded were sufficient to defeat the appellee's right to any relief.

Judgment reversed, with costs, with directions to the court below to carry the demurrer to the answer back and sustain it to the complaint, with leave to both parties to reform their pleadings.

Filed Sept. 20, 1887.

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185	327

No. 12,744.

THE STATE, EX REL. STEIGERWALD, *v.* THOMAS.

WITNESSES.—Order Separating.—Disobedience of Order.—Where there is an order separating the witnesses, a party can not be deprived of the testimony of a witness who has been present throughout the trial, where it was not known at the time of the order, either by the witness or the party calling him, that his testimony would be required, or where the presence of such witness was not by the procurement or connivance of such party, nor attributable to any fault on his part or that of his counsel.

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EVIDENCE.—*Impeaching Testimony.*—*Error to Exclude.*—It is error to exclude competent impeaching testimony, properly and seasonably offered, where no limit to the number of such witnesses has been fixed by the court, although other impeaching testimony has been offered and received.

SAME.—*Witness.*—*Practice.*—Where the question is as to the right of a witness to testify at all, and not as to the competency of his testimony, the party offering him is not required to state what he expects to prove by such witness.

From the Jefferson Circuit Court.

C. A. Korbly and *W. O. Ford*, for appellant.

E. G. Leland and *S. E. Leland*, for appellee.

ELLIOTT, J.—The principal question in this case is thus presented by the record: "The plaintiff called William Johnson, a competent witness of full age, to the stand, who was thereupon duly sworn by the clerk. Thereupon the defendant asked the witness the following preliminary question: 'Were you present in the court-room during the examination of the witnesses, and did you hear their testimony?' and the witness answered, 'Yes, but I did not know I was to be a witness.' The defendant thereupon objected to the examination of said witness on the following grounds: Because the court, at the commencement of the trial, ordered a separation of the witnesses on both sides, and sent them out of the room, and this witness was present and heard the evidence. Thereupon the plaintiff, by *C. A. Korbly*, stated to the court that the plaintiff did not know that said William Johnson was or would be a witness in the cause, or that he knew anything of the facts which the plaintiff would now propose to prove, until after the preceding witness, William Brown, had concluded his testimony, at which time he was informed by a member of the bar, not engaged in the cause, that William Johnson would be a good impeaching witness against David Francis, and that William Johnson was not present in disobedience of the order of the court."

It appears from the statement we have copied from the record that neither Johnson nor the relatrix was in fault, for

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it was not known to either when the order was made that he would be called as a witness.

As it is affirmatively shown that Johnson's presence was not by the procurement or connivance of the relatrix, nor attributable to any fault or neglect on her part or that of her counsel, the trial court erred in refusing to permit him to testify. It has been expressly decided in two recent cases, that where the party is entirely free from fault, the testimony of a witness who disobeys an order of the court can not be excluded. *Davis v. Byrd*, 94 Ind. 525 ; *Burk v. Andis*, 98 Ind. 59.

In the first of these cases the question was closely examined and many authorities cited. We there said: "We hold the true rule to be this: Where a party is without fault, and a witness disobeys an order directing a separation of witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility." We quoted from eminent text-writers like expressions of the rule, and cited the decisions of many courts. Our conclusion on a second examination of the question is, that the English author there referred to was right in saying: "But it seems to be now settled, that the judge has no right to reject the witness on this ground, however much his wilful disobedience of the order may lessen the value of his evidence." 2 Taylor Ev. 1210.

In another text-book a very thorough review of the authorities was made, and it was said: "But it may now be considered as settled, that the circumstance of a witness having remained in court in disobedience to an order of withdrawal, is not a ground for rejecting his evidence, and that it merely affords matter of observation." 2 Phill. Ev. (5 Am. ed.) 744.

Mr. Bishop, with his usual vigor, thus states the doctrine: "On the other hand, if the party was without fault, the judge

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has no right to punish his innocence by depriving him of his evidence, and ruin him at the will of a witness. The testimony should be admitted, subject to observation to the jury. Such is the law in principle." 1 Bishop Crim. Proc., section 1191.

It is insisted by appellee's counsel that a new trial will not be granted although competent impeaching testimony offered on the trial is excluded, and in support of this position they refer to the cases of *Porter v. State*, 2 Ind. 435, *State, ex rel., v. Clark*, 16 Ind. 97, and *Jackson v. Sharpe*, 29 Ind. 167. These cases give them no support whatever, for they merely decide that newly discovered impeaching testimony will not entitle the party to a new trial, and there is no such question here. We regard it as quite well settled, that where competent impeaching testimony is properly and seasonably offered on the trial, it is error to exclude it, and that principle rules here. Nor does the fact that other impeaching testimony was given, deprive a party of additional testimony on the same subject, although it may be that in some cases a limit may be put upon the number of witnesses that may be called to that question. But there was no limit fixed here, and there is no question of that kind made. The single question is, was it right to exclude Johnson's testimony because he had heard other witnesses testify?

The relatrix was not bound to state what she expected to prove by Johnson, because the question is not as to the competency of his testimony, but as to his right to testify at all. The rule is thus stated in *Sutherland v. Hankins*, 56 Ind. 343 (355): "But where, as in this case, the matter complained of is the action of the court, in refusing to permit a witness to testify at all, the grounds of objection to the witness must be shown by a bill of exceptions, and this is all that need be shown in order to present the matter for our consideration." *Shimer v. Butler University*, 87 Ind. 218.

We can not say that the relatrix was not prejudiced by the

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refusal of the court to permit Johnson to testify, and the judgment can not be sustained.

Judgment reversed.

Filed Sept. 20, 1887.

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151	573

No. 13,790.

PURSEL v. THE STATE, EX REL. RONEY.

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OFFICE AND OFFICER.—*County Surveyor.*—*Term of Office.*—*Estoppel.*—P. was elected county surveyor at the general election in November, 1884, and took possession of the office on the 21st of the same month. At the November election, 1886, R. was elected to the same office, and on the 22d of that month demanded of P. the office, with the property belonging thereto, which the latter refused to surrender. In a *quo warranto* proceeding against P.,

Held, that having filled the office for the full term prescribed by the Constitution, he is, as against his regularly elected and qualified successor, estopped from denying that his term of office has expired.

From the Starke Circuit Court.

G. W. Beeman and N. L. Agnew, for appellant.

A. I. Gould and G. A. Murphy, for appellee.

NIBLACK, J.—This was an information in the nature of a *quo warranto* prosecuted in the name of the State, on the relation of Henry C. Roney, against Abner L. Pursel, for the purpose of obtaining possession of the office of county surveyor, together with the records, charts and other property pertaining to the office.

The court made a special finding of the facts to the effect that, at the November election, in 1884, the appellant, Pursel, was elected surveyor for the county of Starke; that, after having been duly commissioned and qualified, he, on the 21st day of said month of November, 1884, entered into the possession of said office, and had ever since continued to dis-

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charge its duties; that, at the November election in the year 1886, the relator, Roney, was elected to the same office, and having been first commissioned and otherwise lawfully qualified, he, on the 22d day of said month of November, 1886, demanded of Pursel the possession of the office, together with the records, charts and other property pertaining thereto; that Pursel refused to surrender the possession of the office, or of anything belonging to the same, and had since continued in the possession thereof, as well as in the discharge of its duties.

The court, thereupon, as a conclusion of law, held that Pursel's term of office had expired on the 21st day of November, 1886, and that the relator, Roney, had become entitled to the possession of the office, together with the records, charts and all other things belonging to it, and, over exceptions and a motion for judgment in favor of Pursel, entered judgment accordingly.

The contention of Pursel is, that applying certain pertinent provisions of the Constitution and laws of this State to the facts as found by the court, his term of office does not expire until the first Monday in November, 1887, and that, consequently, the court erred in holding otherwise as hereinabove stated.

The second section of article 6 of the Constitution provides for the election of a county surveyor for each county, by the qualified voters, who shall continue in office for the term of two years. The act of June 17th, 1852, which went into effect on the 6th day of May, 1853, and was designed to carry this constitutional provision into effect, directed that county surveyors should thereafter be elected at the general elections in the several counties of the State, who should hold their offices for two years from the first Monday in November, next succeeding their election. 1 G. & H. 595; R. S. 1881, section 5948. At that time the general elections were holden annually on the second Tuesday in October, and continued to be holden on that day, either annually or biennially, until

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the year 1881, when, by an amendment to the Constitution, the time of holding general elections was changed to the first Tuesday after the first Monday in November.

On Pursel's behalf the construction insisted upon is, that as Roney was not elected until after the first Monday in November, 1886, his term does not begin until the first Monday of the succeeding November, which means the first Monday in November, 1887, and that, under the holding-over clauses of the Constitution and of the statutes, Pursel is entitled to continue in office until Roney's term thus begins.

Section 9 of the sixth article of the Constitution, to which reference has been made, ordains that "Vacancies in county, township, and town offices shall be filled in such manner as may be prescribed by law." Acting under that provision, the Legislature has prescribed that all vacancies in county offices shall be filled by the board of commissioners of the proper counties respectively, and that an appointment to fill such a vacancy shall expire when a successor is elected, and that such successor shall be elected at the next general election. R. S. 1881, section 5563; *Governor v. Nelson*, 6 Ind. 496.

In the case of *Griebel v. State, ex rel.*, ante, p. 369, the doctrine that the term of an officer fixed by the Constitution can neither be abridged nor extended by a statutory enactment, was fully considered and reaffirmed. It was also then held that, under the operation of the several constitutional provisions and statutes having a bearing on the subject, there was not, and could not be made to be, any uniformity in the several counties of the State as to the time at which persons elected to county offices of the same class shall be entitled to enter upon their duties, where the duration of the term is prescribed by the Constitution. This results from intervening vacancies, and other incidental causes, which fix the times of the beginning, as well as the ending, of particular terms of such offices at different intervals, under the operation of

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the Constitution, and hence beyond the power of legislative control.

Although it was not found that Pursel was lawfully entitled to take possession of the office of surveyor at the time he entered upon its duties, the reasonable inference from the finding of facts is that he was so entitled. Having taken possession of the office in pursuance of his election, and having held the office for the full term of two years—the time fixed by the Constitution—he was at all events, as against his regularly elected and properly qualified successor, estopped from denying that his term of office had expired. That principle was also recognized in the case of *Griebel v. State, ex rel., supra*, and is both just and reasonable in its application to the facts of this case. It only requires Pursel to give to another the benefit of a legal construction which he has assumed and acted upon in his own behalf.

The judgment is affirmed, with costs.

Filed Sept. 20, 1887.

No. 12,867.

JENNER ET AL. v. CARSON.

TORT.—Pleading.—Complaint.—Conspiracy.—Where two or more are sued in tort for an injury to another, an allegation of conspiracy is not necessary, unless the wrong complained of would not have been actionable at all but for the unlawful combination of several persons.

MALICIOUS PROSECUTION.—Complaint.—Averment of Conspiracy.—Evidence.

—A complaint in an action against two or more for malicious prosecution, which charges that the defendants wrongfully, maliciously, and without probable cause, did the several things therein charged, to the plaintiff's injury and damage, is sufficient, and authorizes the admission of evidence to show that the defendants were acting in concert in bringing about the alleged injurious result, without an allegation that they confederated and conspired together.

111	522
163	486

111	522
166	450

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SAME.—*Gist of Action.*—*Damage.*—*Conspiracy.*—In such case the damage is the gist of the action, and not the conspiracy.

From the Marion Circuit Court.

C. Hamlin, for appellants.

C. S. Denny and *W. F. Elliott*, for appellee.

MITCHELL, J.—The complaint of Bennett Carson charged that Leopold A. Jenner, Luke G. Butterfield and Mary L. Barr wrongfully, maliciously, and without probable cause, instituted a criminal prosecution against the plaintiff before a justice of the peace of Marion county, by wrongfully, maliciously, and without probable cause, charging him in an affidavit which the defendant Jenner signed, at the instigation of his co-defendants, with the larceny of a saw-handle of the value of twenty-five cents, and a certain saw-log, of the value of five dollars, the property of Mary L. Barr.

The complaint charges that the defendants, without probable cause, maliciously caused the plaintiff to be arrested and prosecuted on such charge, and that the latter was duly acquitted thereof and discharged before the filing of the complaint herein.

Upon trial by a jury of the issue made, there was a verdict and judgment for the plaintiff, assessing his damages at nine hundred dollars.

The complaint is assailed for the first time in this court by an assignment of error that it does not state facts sufficient.

The only ground of insufficiency urged against the complaint is, that it does not allege that the defendants confederated and conspired together to do the several injurious things therein charged.

There is no merit in this objection. The complaint charges that the defendants wrongfully, maliciously, and without probable cause, did the several things therein charged, to the plaintiff's injury and damage.

This was a sufficient charge, and authorized the admission of evidence to show that the defendants were acting in con-

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oert in bringing about the alleged injurious result, and that it was done maliciously and without probable cause. It is true, that in an indictment for a criminal conspiracy, that being the gist of the charge, it would be necessary to charge, in terms, that the defendants combined, conspired, confederated and agreed with each other, etc.; but when two or more are sued in tort for an injury to another, it is only necessary to allege that they committed the wrong complained of, and that the plaintiff was damaged thereby.

The allegation of a conspiracy in a civil action against several for a tort is of no consequence, so far as respects the cause and ground of action, unless the wrong complained of would not have been actionable at all but for the unlawful combination of several persons. Such is not the case here. The damage is the gist of the action, not the conspiracy. *Hutchins v. Hutchins*, 7 Hill, 104; Cooley Torts, 124; 2 Chitty Pl. 498.

“Where the action is brought against two or more as concerned in the wrong done, it is necessary, in order to recover against all of them, to prove a combination or joint act of all. For this purpose, it may be important to establish the allegation of a conspiracy. But if it turn out on the trial that only one was concerned, the plaintiff may still recover, the same as if such one concerned had been sued alone. The conspiracy or combination is nothing so far as sustaining the action goes; the foundation of it being the actual damage done to the party.” *Hutchins v. Hutchins*, *supra*; *Laverty v. Vanarsdale*, 65 Pa. St. 507.

At the proper time the court, in its seventh instruction, charged the jury substantially, that if they should find from the evidence that the defendant Mary L. Barr had agreed with Bennett Carson, her tenant, that he might cut and use all down timber, except such as might make rail-cuts, and the latter, acting under such agreement, without any felonious intent, took and used a “chunk” or log, five or six feet long, but not long enough to make a rail-cut, Mrs. Barr

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would in that event have had no probable cause for prosecuting him for larceny for taking such property, nor would the other defendants if they knew or ought to have known of such agreement before the institution of the prosecution.

It is said this instruction was erroneous, because there was no evidence to which it was applicable, and because it assumes as a fact a matter in issue about which there was a conflict in the evidence.

The objection that there was no evidence to which the instruction was applicable is not sustained by the record. The evidence tends to show that at the time of the alleged larceny Mr. Carson occupied Mrs. Barr's farm as tenant. Both agreed in their testimony that the tenant was to have the privilege of using such timber as was down, except rail-cuts, for firewood. Acting under this authority, Carson had used what he and some other witnesses called a "chunk," five or six feet long, for firewood. Mrs. Barr and her witnesses claimed that the chunk was a rail-cut. In this state of the evidence, the propriety of the charge is obvious. It is not apparent to us that the charge assumes as true any fact in dispute.

The only other ground upon which a reversal is claimed relates to the sufficiency of the evidence to sustain the finding and judgment.

It would serve no useful purpose to set out the evidence elaborately. That the jury may well have found therefrom that the prosecution against the appellee was without probable cause can not be doubted. It is not so certain, however, but that Mrs. Barr may have been used by others to gratify their personal ends, and that she may be made to suffer for the lack of a judicious friend.

The amount of the verdict seems to us quite out of proportion to any injury which, so far as appears, the appellee could have sustained; but as we can discover nothing which raises a suspicion that the jury acted from prejudice, partiality or other improper motives in making their assessment,

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and as their verdict met the approval of the court in which the judgment was pronounced, we do not feel warranted in disturbing their conclusion.

Judgment affirmed, with costs.

ELLIOTT, J., did not participate in the consideration of this case.

Filed Sept. 21, 1887.

No. 12,625.

STEWART v. SMITH.

EVIDENCE.—*Foreclosure of Mortgage.*—*Payment.*—*Set-Off.*—Where the issue joined upon a complaint to foreclose a mortgage, executed to secure unpaid purchase-money, is upon pleas of payment and set-off, evidence that the cash payment stipulated in the contract of sale has been made is not competent.

NEW TRIAL.—*Surprise.*—*Waiver.*—A party who sits by, and without asking a postponement takes the chances of a trial, can not, as a general rule, obtain a new trial on the ground of surprise.

PRACTICE.—*Order of Introducing Evidence.*—*Discretion of Trial Court.*—*Supreme Court.*—It is within the discretion of the trial court to admit or exclude in reply evidence that should have been given in chief, and unless there is an abuse of such discretionary power the Supreme Court will not disturb its decision.

From the Grant Circuit Court.

R. W. Bailey, for appellant.

A. Steele and R. T. St. John, for appellee.

ELLIOTT, J.—The question presented to the trial court for decision was as to the amount due upon a note and mortgage executed by the appellant, so that the only evidence relevant or material was such as tended to show payment of the note or to prove items of set-off. It is, therefore, clear that no error was committed in rejecting testimony that the appellee stated that the appellant had paid him the cash payment

111	596
127	495
111	526
142	636
111	526
153	430
111	526
167	393

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which had been agreed upon as part of the purchase price of the land on which the mortgage was executed. Where the issue joined upon a complaint to foreclose a mortgage, executed to secure the unpaid purchase-money, is upon a plea of payment and a plea of set-off, evidence that the cash payment stipulated in the contract of sale has been made is not competent.

A party who sits by, and without asking a postponement takes the chances of a trial, can not, as a general rule, obtain a new trial on the ground of surprise. There is nothing in this case to take it out of this general rule.

The defendant who pleads payment should offer all his evidence in chief, and has no right to divide it and offer part in reply. It is true the trial court may, in its discretion, admit the evidence in reply, but it is not bound to do so. The proper course is to offer all the evidence in chief, and the trial court may always require this to be done, unless some cause is shown for relaxing the rule. Some of the cases, indeed, go so far as to declare that it is error to admit in reply evidence that should have been given in chief, but the weight of authority is that the matter is within the discretion of the trial court. Where there is a discretionary power the appellate court will not reverse, unless there has been an abuse of the power, and there was none in this instance. There was no available error, therefore, in excluding the testimony tending to prove payment offered by the defendant after he had given his evidence in chief and the plaintiff had given his in answer.

Judgment affirmed.

Filed Sept. 21, 1887.

No. 12,971.

ADAMS ET AL. v. GLIDDEN.

SHERIFF'S SALE.—Redemption of Real Estate.—Act of 1861.—Rents and Profits.—Judgment Debtor Alone Liable for.—Under the redemption law of 1861, no one except the judgment debtor could be held liable to the execution purchaser for the rents and profits of the real estate during the year allowed for redemption.

SAME.—Act of 1879.—Occupant of Land Liable for Rents and Profits.—The redemption law of 1879, which superseded that of 1861, made the occupant, although not the judgment debtor, liable for the rents and profits of real estate during the year for redemption.

SAME.—Redemption Law of 1881.—No Liability for Rents and Profits by Virtue of Act.—Under the act of 1881 on the subject of redemption, no one is liable to the execution purchaser, by virtue of the act alone, for the rents and profits of real estate during the period allowed for redemption.

SAME.—Vendor's Lien.—Redemption Laws Construed.—A vendor's lien attached to real estate in 1876. After the taking effect of the redemption law of 1881, the lien was enforced, and the real estate sold by the sheriff under the decree of foreclosure. At the time of the foreclosure and sale, and during the year following the sale, the real estate was occupied by a grantee of the judgment debtor.

Held, that such occupant is not liable to the execution purchaser for the rents and profits of the land during the year following the sale, either under the provisions of the redemption law of 1861 or that of 1881.

From the Henry Circuit Court.

J. Brown and W. A. Brown, for appellants.

J. H. Mellett and E. H. Bundy, for appellee.

ZOLLARS, C. J.—It is averred in appellants' complaint, that in 1876 Lydia Adams sold and conveyed to Ira B. Adams certain real estate, describing it; that Ira B. Adams sold and conveyed it to the Citizens State Bank of New Castle; that in December, 1881, Lydia Adams brought suit for the purchase-money and to enforce her vendor's lien against the real estate; that the bank, being at that time the owner of the real estate, was made a party defendant, and that she recovered a judgment for the balance due, and an order and decree for the sale of the real estate; that pend-

111	528
129	182

111	528
147	27

111	528
151	632
151	635

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ing the action the bank sold and conveyed the real estate to one Ungers, who, also, pending the action, sold and conveyed it to appellee; that in 1884 the real estate was sold by the sheriff under the decree, and was purchased by Lydia Adams, who received from the sheriff a certificate of purchase; that soon after the sale she sold and transferred the certificate to appellants, who received a sheriff's deed for the real estate in 1885, and that appellee occupied it, receiving the rents and profits thereof, from the time of his purchase until the execution of the sheriff's deed, including the year allowed for redemption.

Upon the foregoing facts appellants claim that appellee is liable to them for the rents and profits of the real estate for the year during which it might have been redeemed.

The court below sustained a demurrer to the complaint. That ruling is assigned as error.

It is very clear that appellee was not, and is not, the judgment debtor. At the time of the sale by Lydia Adams the statute of 1861 was in force, which provided that, where real estate should be sold upon a judgment or decree, the judgment debtor should be entitled to the possession of the premises for one year after the sale; and that in case they should not be redeemed during that year, as in the act provided, he should be liable to the purchaser for the reasonable rents and profits. 2 R. S. 1876, p. 220.

Under that statute, as interpreted by this court, neither the grantee of the judgment debtor, nor any one else except the judgment debtor, could be held liable to the execution purchaser for the rents and profits of the real estate during the year allowed for redemption. *Bryson v. McCreary*, 102 Ind. 1, and cases there cited.

In the above case the act of 1861 was in force at the time the contract between the parties was made, and the sale and occupancy were under the act of 1879 (Acts 1879, p. 176), which took the place of the act of 1861, and made the occu-

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pant, although not the judgment debtor, liable for the rents and profits of real estate during the year allowed for redemption.

It was held in that case, that a subsequent law could not increase the liability of the debtor, nor take from the creditor his right to the rents and profits of real estate held by the judgment debtor during the year allowed for redemption, as given by the act of 1861, in force at the time the contract was made; that the act of 1879 was not repugnant to the Constitution, as violating the obligations of contracts under the act of 1861, in that it only provided a more efficient remedy for the enforcement of the contract between the parties under that act.

The case before us is clearly distinguishable from that case. Here the act of 1861 was in force at the time the contract of sale was made by Lydia Adams. Neither the sale by the sheriff nor the occupancy by appellee was under the act of 1879. They were both under the act of 1881. R. S. 1881, sections 767 and 777. Under this latter act, no one is liable to the execution purchaser, by virtue of the act alone, for the rents and profits of real estate during the year allowed for redemption. *Travellers Ins. Co. v. Brouse*, 83 Ind. 62. And while that act did not, and could not, destroy any rights which appellants may have had by virtue of the contract of Lydia Adams under the act of 1861, it did effectually repeal that act and the act of 1879. The repeal of the act of 1879 did not violate any contract in which appellants were interested, first, because that act related to the remedy, and, second, because the contract of Lydia Adams, through whom appellants acquired whatever rights they have, was under the act of 1861.

Without extending this opinion, it is sufficient to say, that appellants can not recover by virtue of the act of 1861, because, if for no other reason, that act made the judgment debtor alone liable for rents and profits, and appellee was not, and is not, such judgment debtor. Neither can they recover

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under the act of 1881, which was in force at the time of the sale, and the occupancy by appellee, because, under that act, he could in no event be held liable for the rents and profits, by virtue of the act alone.

Judgment affirmed, with costs.

Filed Sept. 21, 1887.

No. 12,324.

GRAY v. NATIONAL BENEFIT ASSOCIATION.

LIFE INSURANCE.—*Age of Assured.*—*Requirements of By-Laws.*—*Disregard of.*—*Estoppel.*—A life insurance company, organized under the laws of this State, which issues a policy to one under the age required by its by-laws merely, with knowledge of the assured's true age, or which, after obtaining such knowledge, still retains the consideration and makes no offer to cancel the contract, is estopped to set up the matter of age as a defence to an action on the policy.

SAME.—*By-Laws.*—*Violation of by Insurer.*—*Rights of Third Persons.*—By-laws enacted by the directors, for their own government in the management of the business of the corporation, can not be extended to affect the validity of acts done in disregard thereof, especially where the rights of third persons are concerned.

SAME.—*Pleading.*—*Setting Out By-Law.*—Where, in an action on a life insurance policy, the insurer bases its defence upon its rules or by-laws, they must be set out in the answer or the latter will be bad.

From the Marion Superior Court.

R. Hill and *R. N. Lamb*, for appellant.

S. M. Shepard, *C. Martindale* and *J. Buchanan*, for appellee.

Howk, J.—This is an appeal by Bridget Gray, the plaintiff below, from a judgment of the Marion Superior Court, in general term, against her for appellee's costs. By a proper assignment of error here, she has brought before this court the same error she assigned below, in general term, namely:

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That the Marion Superior Court, at special term, erred in sustaining appellee's demurrer to appellant's amended reply herein.

The case is before us on the pleadings. In her complaint, appellant alleged that appellee, the National Benefit Association of Indianapolis, was a corporation organized under the laws of this State, and was engaged in the business of insuring the lives of persons against death, caused by bodily injuries effected through external, violent and accidental means, when death shall result therefrom within six months from the happening of such accident, and during the time such person shall be a member of such association; that in pursuance of, and in accordance with, the business of such appellee, on or about the 27th day of March, 1882, the appellee issued to one William E. Gray a certain policy or certificate of insurance in such association, and took William E. Gray into the association as a member thereof, a copy of which certificate of membership or policy was filed with and made part of such complaint; that while William E. Gray was a member of such association, to wit, on the 1st day of December, 1882, he, William E. Gray, was employed as a locomotive fireman on a locomotive engine on the Kentucky Central Railroad; that while so employed, the locomotive whereon he, William E. Gray, was so employed, collided with another locomotive and train of cars on such railroad, and, in such collision, and by reason thereof, he was thrown violently against the boiler of the locomotive engine, whereon he was fireman, and pressed against the same by the tank thereof, and was thereby instantly killed by external, violent and accidental means; that, on or about the — day of —, 1883, and within six months after the accident which caused the death of William E. Gray, appellant furnished the appellee with notice and proper and sufficient proofs of the death of William E. Gray, in accordance with the requirements of such certificate or policy, and, in all respects, had done and performed all the conditions and stipulations of

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such contract on her part; but that the appellee had and still refused to pay such sum of \$1,000, in such certificate or policy mentioned, or any part thereof. Wherefore, etc.

To appellant's complaint the appellee answered in two paragraphs, whereof the first was a general denial. In the second paragraph of its answer, the appellee said that its rules and by-laws forbade the issuance of a certificate of membership to any person under the age of eighteen years, or over the age of sixty-five years; and appellant's decedent, well knowing this rule of such association, falsely and fraudulently misrepresented his age to appellee, in his application for membership, and warranted to appellee that he was eighteen years of age, whereas he well knew at the time that he was under the age of eighteen years; that the appellee never knew that such decedent was under eighteen years of age until the appellant presented to it the proofs of his death, wherein she made oath that he was under the age of eighteen years. Wherefore the appellee said that such certificate of membership was void, and the appellant ought not to have and maintain her action thereon.

For her amended reply to the second paragraph of appellee's answer, the appellant said that the contract sued on was made and executed between appellee and appellant's son, William E. Gray, at the city of Covington, in the State of Kentucky; that one George Jobe was the appellee's agent and acted on its behalf in making such contract, and prepared the application of William E. Gray for such certificate of membership; that William E. Gray fully explained to such agent, before the contract was made and before his application for such certificate of membership was prepared, that, at the time the application was made and such certificate issued, he was under the age of eighteen years, and correctly informed such agent what his true age was, which, appellant said, was, to wit, seventeen years and ten months; that such agent then informed William E. Gray that the fact that he was under the age of eighteen years by so short a

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time as two months would make no difference, and that, under the circumstances, when so explained to such agent, it would be proper for him to sign the application which the agent prepared, showing his age to be eighteen years; that thereupon William E. Gray signed such application accordingly, and paid such agent, for the appellee, the sum of \$11.20, as admission fee and for two advance assessments, which the appellee still retained; that appellee was not at all deceived thereby, but, through its agent, had full knowledge of the true state of facts in regard to the age of William E. Gray before the issuing of the certificate of membership sued on herein. Wherefore, etc.

We are of opinion that the court below, at special term, erred in sustaining appellee's demurrer to appellant's amended reply to the second paragraph of appellee's answer herein, and that, because of this error, the general term also erred in affirming the judgment below at special term. It will be observed that, in the second paragraph of its answer herein, appellee has not alleged that there was any provision in the law of its incorporation or charter which forbade its issuance of such a certificate of membership therein as the one sued on in this action to any person under or over any specified age. It may be safely assumed, in the absence of any averment to the contrary, that appellee was incorporated under and pursuant to the provisions of an act entitled "An act for the incorporation of insurance companies, defining their powers and prescribing their duties," approved June 17th, 1852, and in force since May 6th, 1853. 1 R. S. 1876, p. 584, *et seq.* In section 20 of this act (section 3727, R. S. 1881), the general power is conferred upon corporations, such as the appellee, to "make insurance * * * on the life or health of any person," without limitation of any kind as to the age of such person in that or any other section of the general law of the State under which they are created and to which they owe their existence. Of course, if the statute of this State which constitutes appellee's charter had con-

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ferred upon it the power only to make insurance on the life or health of any person between certain ages, or had forbidden appellee to make insurance on the life or health of any person under or over specified ages, it would not have been competent for appellee, either by its principal officers or by any agent, to have made valid insurance on the life or health of any person in violation of the limitation as to the age of such person in the law of its existence. *Leonard v. American Ins. Co.*, 97 Ind. 299, and authorities there cited; *Presbyterian Mut. Assurance Fund v. Allen*, 106 Ind. 593.

In the second paragraph of its answer, as we have seen, the appellee averred that its rules and by-laws forbade the issuance of a certificate of membership to any person under the age of eighteen years or over the age of sixty-five years; and appellee's defence to this suit, as stated in such paragraph, is predicated upon the prohibition in its rules and by-laws against the issuance of the certificate to William E. Gray, who, as alleged, well knew that he was under the age of eighteen years. It was also alleged that William E. Gray, well knowing appellee's rule and by-law, falsely and fraudulently misrepresented his age in his application for membership, and warranted to appellee that he was eighteen years of age.

We are of opinion that the facts stated in appellant's amended reply were amply sufficient, if true, and as they were well pleaded their truth is admitted by the demurrer thereto, to avoid appellee's defence to this suit, as stated in the second paragraph of its answer. Appellant averred and appellee admitted that the contract in suit was executed between appellee and appellant's son, William E. Gray, at the city of Covington, in the State of Kentucky; that George Jobe was appellee's agent, and acted for it in making such contract, and prepared William E. Gray's application for such certificate of membership; that he, Gray, fully explained to such agent, before the contract was made and before his application for such certificate was so prepared, that he was then

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under the age of eighteen years, and correctly informed such agent what his true age was, which, appellant said, was seventeen years and ten months; that such agent then informed him, Gray, that the fact of his being then under eighteen years of age by so short a time as two months would make no difference, and that, under the circumstances, it would be proper for him to sign the application prepared by such agent, which he, Gray, accordingly signed, and paid such agent, for appellee, the sum of \$11.20 as an admission fee and for two advance assessments, which appellee still retained; and that appellee was not deceived, but through such agent had full knowledge of the true age of William E. Gray before the issue of the certificate of membership sued on herein.

It is very clear, we think, that the court below erred in sustaining appellee's demurrer to appellant's amended reply. The demurrer searched the record, and as the paragraph of answer to which such amended reply was pleaded was clearly insufficient, the court ought to have overruled the demurrer as to such reply, and to have carried the same back and sustained it to the second paragraph of appellee's answer. This is so, under the well recognized rule of practice that even a bad reply to a bad paragraph of answer is sufficient to withstand a demurrer thereto for the want of facts. *Aetna Ins. Co. v. Baker*, 71 Ind. 102; *State, ex rel., v. Porter*, 89 Ind. 260; *Clawson v. Chicago, etc., R. W. Co.*, 95 Ind. 152.

We have said that the second paragraph of appellee's answer was clearly insufficient. The defence attempted to be stated in such paragraph was, that appellee was prohibited from issuing a certificate of membership to any person under the age of eighteen years; and that, with knowledge of such prohibition and of the fact that he was under eighteen years of age, William E. Gray made his application for and procured from appellee the issuance of the certificate of membership sued on in this action.

The appellee was not prohibited, as we have seen, by any provision of the law under which it was incorporated, or of

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any other statute of this State, from insuring the life of William E. Gray, nor from executing the certificate or contract sued on, for the benefit of his mother, the appellant herein, by reason or on account of the fact that at the date of his application and of such certificate or contract William E. Gray was under or over any specified age. The "rules and by-laws" upon which appellee's defence to this suit, as stated in the second paragraph of its answer, is founded, were laws of its own making, for its own government, and, apparently, for the purpose of imposing restrictions on its own acts, or powers to act, which were not imposed on appellee by any provision of the act under which it was incorporated, or by any other statutory provision in force in this State.

Where the "rules and by-laws" are made by the directors for their own government in the management of the business of the corporation, it would seem to be clear that the same power which enacts can also repeal such rules and by-laws. They can not be extended to affect the validity of acts done in disregard thereof, especially when the rights of third persons are concerned. Wood's Field on Corporations, section 267, and cases cited in foot-notes.

Conceding, without deciding, that it was not competent for appellee, or any of its officers or agents, to waive or suspend the operation of its "rules and by-laws," or to execute and issue a valid certificate of membership or contract in any case where the issuance thereof is prohibited by such "rules and by-laws," we are of opinion that the second paragraph of appellee's answer was, and is, fatally defective, in this, that it fails to give or set out therein the "rules and by-laws" upon which its special defence to this suit was and is predicated, but gives merely, in lieu thereof, the pleader's conclusion as to the effect of such rules and by-laws upon the issuance of the certificate or contract sued on. The rules and by-laws upon which appellee relied in the second paragraph of its answer ought to have been set out therein, so that the court might determine whether or not they forbade

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the issuance of the certificate or contract upon which the appellant sued herein. The second paragraph of answer was clearly bad, and the demurrer to the reply ought to have been carried back by the court and sustained to such paragraph of answer.

It is shown by the record of this cause that William E. Gray applied to appellee's agent at Covington, Kentucky, for the certificate or contract in suit on the 24th day of March, 1882, and that on the 27th day of March, 1882, such certificate or contract was issued to him by appellee, and was payable to Bridget Gray, the appellant herein, ninety days after the receipt of satisfactory proofs of the death of William E. Gray, etc. It is further shown that, on the 1st day of December, 1882, and while the certificate or contract sued on was still in full force, William E. Gray was instantly killed in a railroad collision, by external, violent and accidental means; and that on the — day of —, 1883, and within six months after such death of William E. Gray, appellant furnished appellee with satisfactory proofs of such death. This suit was commenced by appellant against appellee in the court below, for the recovery of the amount due on such certificate or contract, on the 26th day of October, 1883, and, on February 20th, 1884, appellee filed its answer herein, the substance of which we have heretofore given. On the 8th day of December, 1884, appellant filed her amended reply, heretofore given in this opinion, and on the same day appellee's demurrer was sustained to such reply.

We have said that the facts stated in appellant's reply, which are admitted to be true as the case is now presented, were abundantly sufficient to avoid appellee's defence to this suit, as stated in the second paragraph of its answer. Appellee admits, by its demurrer, that it had full knowledge of the true age of William E. Gray before it issued to him the certificate of membership or contract upon which appellant has sued in this action; and that, with this knowledge, appellee still retained, on the 8th day of December, 1884, the

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sum of money paid by William E. Gray for such certificate, and for assessments against him as one of its members. In the face of these admissions in regard to its knowledge of the true age of William E. Gray before appellee issued to him the certificate or contract sued on herein, its defence to this suit, predicated upon its rules and by-laws, and upon the representation and warranty of William E. Gray, in his application for such certificate, is entirely avoided. If it were true, as stated in its answer, that appellee never knew that William E. Gray was under the age of eighteen years until appellant furnished it with proofs of his death, yet as the record shows that such proofs of death were so furnished more than eighteen months before this suit was finally determined in the court below, and as it does not appear that appellee had ever offered to rescind or cancel the certificate or contract sued on, or to refund the money it had received thereon, it must be held, we think, that such certificate or contract had been so ratified and confirmed by appellee as to estop it from asserting the defence to this suit attempted to be stated in the second paragraph of its answer.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrer to the reply and to carry it back and sustain it to the second paragraph of answer, and for further proceedings in accordance with this opinion.

Filed April 22, 1887; petition for a rehearing overruled Nov. 19, 1887.

 White et al. v. Stanton et al.

No. 12,924.

WHITE ET AL. v. STANTON ET AL.

MECHANIC'S LIEN.—*Notice of Intention to Hold.*—*Description of Real Estate.*—

The notice of an intention to hold a mechanic's lien may include more land than ought to be sold to discharge the lien, and where, in such notice, the intention is declared to hold a lien on several lots, the numbers of which are given, and "the dwelling-house erected thereon," it is sufficiently definite in that regard.

SAME.—*Description in Notice Aided by Averments of Complaint.*—Where the description of the real estate, in a notice of an intention to hold a mechanic's lien, is so defective as to be insufficient of itself to identify any particular tract of land, but, with the aid of proper averments, it can be rendered definite and certain by the introduction of extrinsic evidence, it will be held sufficient for the purpose intended, and a true description may be supplied at the hearing.

SAME.—*Invalid Notice.*—Where the description in such a notice is so uncertain as to afford no clue to a more definite and correct description, no lien is acquired.

SAME.—*Defective Notice Cured by Averments.*—*Judicial Knowledge.*—Where a notice of intention to hold a mechanic's lien failed to disclose the county and State in which the real estate upon which the lien was claimed was situate, but the complaint for the foreclosure of the lien averred that the land was situate in the county where the action was pending, that the parties all resided in that county when the notice was filed, and that the notice was recorded in the recorder's office of the same county, these averments, taken in connection with the judicial knowledge of the court that a section of land, corresponding generally with the one described in the notice, lies within that county, are sufficient to supply the defect.

From the Porter Circuit Court.

J. H. Gillett, for appellants.

E. D. Crumpacker and *P. Crumpacker*, for appellees.

NIBLACK, J.—Complaint by Levi F. White and Theron H. Bell, partners doing business under the name and style of White & Bell, against Aaron Stanton, Caroline Stanton, Sarah Malone and John Hansford, to enforce a lien against real estate.

The complaint charged that, prior to the 4th day of June,

111	540
115	531
116	386
123	271
111	540
128	61
111	540
137	635
138	106
111	540
144	100
111	540
168	366

White et al. v. Stanton et al.

1885, the defendant Aaron Stanton purchased a bill of lumber of the plaintiffs at and for the price of sixteen dollars and eighty-one cents; that said lumber was purchased to be, and was in fact, used in the construction of a building situate on the following real estate in Porter county, in this State, to wit: The east half of the northwest quarter of section sixteen (16), in township thirty-five (35) north, and in range five (5) west, and otherwise described as lots Nos. one (1), four (4), five (5) and ten (10), in said section sixteen; that at the time of said sale, and the use of said lumber in said building, the said Aaron Stanton was the owner in fee-simple of said real estate; that afterwards, and within sixty days after the purchase of said lumber, the plaintiffs executed, and caused to be recorded in the mechanic's lien record of said county, a notice of their intention to hold a lien on the real estate above described, a copy of which notice was filed with and made a part of the complaint; that the parties to said complaint were residents of, and the real estate therein described was and still is situate in, said county of Porter; that by mistake the county in which said real estate was situate was not stated in said notice, but that said real estate was well known to the citizens of said county of Porter by the description contained in said notice; that the amount for which said lumber was sold was still due and unpaid; that the defendant Caroline Stanton was the wife of her co-defendant Aaron Stanton, and claimed to have become the owner of said real estate by a conveyance subsequent to the accruing of the lien of the plaintiffs; that the defendant Hansford had purchased a part of said real estate from said Caroline and still owned the same; that the defendant Sarah Malone claimed some interest in said real estate junior to the lien of the plaintiffs. Wherefore a judgment against said defendant Aaron Stanton and the foreclosure of said alleged lien were demanded.

The copy of the notice filed with the complaint was as follows:

White et al. v. Stanton et al.

" To Aaron Stanton, Caroline Stanton, and others concerned :

" You are hereby notified that we intend to hold a mechanic's lien on lots one (1), four (4), five (5) and ten (10), in block two (2), in section sixteen (16), township thirty-five (35) north, range five (5) west, containing eighty acres, more or less, as well as the dwelling-house erected thereon by ———, for the sum of sixteen and $\frac{81}{100}$ (\$16.81) dollars, and materials furnished by us in the erection and construction of said house, which materials were done and furnished by us at your special instance and request, and within the last sixty days.

WHITE & BELL.

" June 4th, 1885."

The defendants Caroline Stanton and Sarah Malone demurred separately and severally to the complaint, and, their demurrers being sustained, they had final judgment upon demurrer.

This appeal, therefore, presents only the question of the sufficiency of the complaint as against the said Caroline Stanton and Sarah Malone.

The objection urged to the complaint is based upon the alleged insufficiency of the notice to create a lien upon the land, or any part of it, described in that pleading, and particularly as against subsequent purchasers or junior encumbrancers.

It is claimed in support of this objection that the notice is fatally defective on account of its failure :

First. To state the particular lot or parcel of land upon which the dwelling-house was located.

Secondly. To name the county and State within which the land attempted to be described was situate.

There was nothing in the phraseology of the notice which excluded the inference that the lots described by it did not lie compactly together, with the dwelling-house resting partly upon each. On the contrary, the fair inference, from the words used, was that the four lots named comprised as an entirety an eighty-acre tract of land, on some part of which

the house was erected, which tract in turn constituted a part of section sixteen (16), in township thirty-five (35) north, and of range five (5) west.

This was sufficient to put all parties interested upon their inquiry as to which particular lot, if any one, the house was situate upon.

The question as to which particular tract of land, and how much, shall be subjected to the operation of a mechanic's or material man's lien is one for the court after hearing the evidence, and hence the notice of an intention to hold such a lien may include more land than ought to be sold to discharge the lien. Generally, so much land, and only so much, will be included in and subjected to the lien as will, under the circumstances, be held proper and necessary to the use and enjoyment of the particular house in question. Overton Law of Liens, p. 585.

The notice in this case referred to the dwelling-house as having been erected on all the lots contained in it, and that was sufficiently definite as to its particular location for all the purposes for which a notice in such cases is required. As applicable to the description of real estate in a deed or a mortgage the rule is, that where the description is so uncertain as to afford no reliable clue to a more definite and correct description, no title passes, or lien is acquired, as the case may be; but that where the description, though too defective and insufficient of itself to identify any particular tract of land, can, nevertheless, be aided by proper averments and rendered definite and certain by the introduction of extrinsic evidence in support of such averments, it will be held to be sufficient for the purpose intended, and a true description will be supplied at the hearing. *Rucker v. Steelman*, 73 Ind. 396; *Tindall v. Wasson*, 74 Ind. 495; Jones Mort., sections 65, 66 and 1462.

The same rule applies to the description of lands in notices of an intention to hold a mechanic's or material man's

The Home Insurance Company v. Howard.

lien. *City of Crawfordsville v. Johnson*, 51 Ind. 397; *Kealing v. Voss*, 61 Ind. 466; *Newcomer v. Hutchings*, 96 Ind. 119.

A clear distinction is, consequently, recognized by the authorities between descriptions which are radically and incurably uncertain, and those which, by the means referred to, may be rendered definite and certain.

The complaint in this case averred that the land is situate in Porter county, in this State; that the parties all resided in that county when the notice of an intention to hold a lien was filed, and that the notice was recorded in the recorder's office of the same county. These averments, when taken in connection with the fact that we know judicially that a section of land corresponding generally with the one described in the notice lies within the county of Porter, were sufficient to supply the defect arising out of the failure of the notice to designate the county and State within which the land and dwelling-house were situate.

Our conclusion, therefore, is that the notice in question contained a defective and incomplete description of the real estate which it intended to describe, but not a wholly uncertain description, and that, in consequence, the demurrers to the complaint were erroneously sustained. *Dutch v. Boyd*, 81 Ind. 146.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed Sept. 21, 1887.

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116 283
120 462
131 123

111 544
124 222

111 544
130 86

111 544
146 588

No. 13,857.

THE HOME INSURANCE COMPANY v. HOWARD.

CONTRACT.—Insurance.—Compromise of Disputed Liability.—Rescission.—When Necessary Prior to Action on Original Obligation.—A recovery can not be had upon a contract which has been released and surrendered in pursuance of a subsequent contract, upon which an amount has been paid as

The Home Insurance Company v. Howard.

a compromise of a disputed liability upon the original obligation, so long as the subsequent contract remains unrescinded and in force, even though the compromise was effected by fraud.

From the Sullivan Circuit Court.

A. Gilchrist, C. A. DeBruler, J. T. Hays and H. J. Hays,
for appellant.

J. C. Briggs, W. C. Hultz and O. B. Harris, for appellee.

MITCHELL, J.—Howard brought this action to recover upon a policy of fire insurance issued to him by the Home Insurance Company of New York.

It appears that after the loss occurred, and before the policy matured, the company claimed that by reason of certain facts known to it, relating to the origin of the fire, it was not liable upon its policy. A compromise was accordingly agreed upon, whereby, in consideration of twenty-five dollars paid to the plaintiff, the policy was surrendered up to the company and cancelled. This agreement was evidenced by a writing endorsed on the policy in the following language:

“PLEASANTVILLE, June, 1886.

“Received of R. L. Klum, assistant State agent, twenty-five dollars in currency, which is in full of all claims I now have, or may have, under this policy for loss or damage by fire of May 8th, 1886, or otherwise, and this policy is hereby fully cancelled and surrendered to the Home Insurance Company of New York.

RUEL HOWARD.

“Attest: W. STEWART.”

The plaintiff claimed that the settlement and release had been procured from him while laboring under physical and mental distress, by the false and fraudulent representations of the company's agent.

Upon the plaintiff's motion the case was tried by a jury, as an action at law. The jury returned a verdict for twelve

The Home Insurance Company v. Howard.

hundred dollars, and, over the appellant's motion for a new trial, judgment was given accordingly.

The controlling question is, whether the finding and judgment are maintainable, in the absence of averment and proof that the plaintiff avoided the settlement and cancellation endorsed on the policy prior to the commencement of the action. This question arises on the pleadings, as well as upon the motion for a new trial.

The action being at law to recover upon the policy as a subsisting obligation, it follows inevitably that the contract of settlement and cancellation above set out, not being void, constitutes an insuperable barrier against a recovery so long as it is not rescinded or avoided by an offer to return the consideration paid for it. The case is not distinguishable from *Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479.

In such a case as this, a recovery can not be had upon a contract which has been released and surrendered up, in pursuance of a subsequent contract, upon which an amount has been paid as a compromise of a disputed liability upon the original obligation, so long as the subsequent contract remains unrescinded and in force. *McMichael v. Kilmer*, 76 N. Y. 36; *Gould v. Cayuga County Nat'l Bank*, 86 N. Y. 75; *Bisbee v. Ham*, 47 Maine, 543; *Worley v. Moore*, 97 Ind. 15, and cases cited.

It does not alter the case that the compromise may have been brought about by the fraud and misrepresentation of the defendant, or that in the end it was found that a sum largely in excess of the amount paid to settle the disputed liability was due the plaintiff.

As is said in *Gould v. Cayuga County Nat'l Bank*, *supra*, "In all actions of trover or replevin to recover the property parted with, and in all actions based solely upon the original relations between the parties, the plaintiff must show that he rescinded the fraudulent contract before the commencement of the action; in other words, that he had a cause of action when he commenced his action."

The Home Insurance Company v. Howard.

One who has been led into a contract upon which he has received something of value can not ignore the contract, however induced, and proceed in a court of law as if the relations of the parties were wholly unaffected thereby. He can not, while retaining its benefits, and thus affirming the contract, treat it as though it did not exist. "He can not treat it as good in part and void in part, but must affirm or avoid it as a whole." *Higham v. Harris*, 108 Ind. 246, and cases cited; *Evans v. Gale*, 17 N. H. 573 (43 Am. Dec. 614).

The present is quite unlike the case of a compromise or composition by a debtor with his creditors, where the liability of the debtor is conceded, and no dispute exists as to the amount. Where a debtor has effected a composition with a creditor, the liability being conceded, a different rule controls.

In such a case the creditor agrees to release an undisputed claim upon receiving payment of an amount less than what is conceded to be due. If the latter has been led into the agreement by fraud, or if there has been bad faith or concealment on the part of the debtor, the agreement is vitiated, and the principles applicable to cases of rescission do not apply. It is not essential, under such circumstances, that the creditor should have returned the amount received before bringing an action to recover the balance of the original debt. *Hefter v. Cahn*, 73 Ill. 296; *Bank of Commerce v. Hoeber*, 8 Mo. App. 171; *Enneking v. Stahl*, 9 Mo. App. 390; *Pierce v. Wood*, 3 Foster (N. H.), 519; *Seving v. Gale*, 28 Ind. 486.

Where, however, one person denies any liability whatever, another may not first obtain from him what he can under an agreement to compromise, and afterwards, with the money so obtained, without avoiding that agreement, prosecute an action at law to recover as much more of the claim in dispute as he may chance to secure.

Where one has been induced to compromise a claim by fraud he can rescind by restoring, or offering to restore, what he has received as a consideration for the compromise. He

The Home Insurance Company v. Howard.

may then maintain an action at law upon the original contract, treating the compromise as rescinded. A person thus situated may, instead of rescinding and suing at law, keep what he has received and commence a suit in equity to rescind the fraudulent compromise and to obtain in the same action equitable relief, offering in his complaint to restore what he has received in case it shall be adjudged he is not entitled to retain it. *Higham v. Harris, supra*, and cases cited ; *Gould v. Cayuga County Nat'l Bank, supra*.

Or a person so circumstanced may retain what he has received and sue whoever is liable for the consequences of the deceit by which the compromise was brought about, and recover whatever damages resulted therefrom.

In support of the judgment our attention is called to *McLean v. Equitable Life Assurance Society*, 100 Ind. 127 (50 Am. R. 779). The facts in the case cited are in many respects analogous to those here under consideration, and, so far as we may judge, the point we have been considering might well have been made there. It is enough to say, however, that the question does not seem to have been made, and there is, therefore, nothing decided in that case in conflict with our conclusion in this.

It is not necessary that we should notice other incidental questions.

The court erred in overruling the motion for a new trial.
Judgment reversed, with costs.

Filed Sept. 28, 1887.

The Evansville and Indianapolis Railroad Company v. Hawkins. *

No. 13,217.

THE EVANSVILLE AND INDIANAPOLIS RAILROAD COMPANY v. HAWKINS.

CONTINUANCE.—*Absence of Attorney.—Discretion of Trial Court.—Reversal of Judgment.*—The refusal to continue a cause, on account of an attorney employed therein being professionally engaged elsewhere, is not a ground for reversal, unless it clearly appears that injustice has been done, and the discretion vested in the trial court plainly abused.

From the Daviess Circuit Court.

A. Iglehart, J. E. Iglehart and E. Taylor, for appellant.

W. R. Gardiner, J. C. Suit and S. H. Taylor, for appellee.

ELLIOTT, J.—The issue between the parties to this cause was formed by the answer of general denial to the appellee's complaint, which sought to recover damages for injuries received by the appellee while a passenger on one of the appellant's trains.

A single question is presented, and that is: Did the trial court err in refusing to grant the appellant a continuance?

The issues were closed on the 10th day of June, 1885, and, on that day, the cause was continued on the appellant's motion. On the 7th day of October, of that year, a second application for continuance was made by the appellant and it is on that application that error is alleged. In support of the application affidavits were filed stating, in substance, that Messrs. Iglehart and Taylor were the regular attorneys of the appellant; that they had examined and prepared the defence of the cause, and alone had charge of said preparation, and that without their assistance the case could not properly be tried on the part of the defendant; "that John H. O'Neill, Esq., has been retained as local counsel only, and has had no charge of the preparation of the case or consultation with his associate counsel, and, therefore, is not prepared to conduct the defence; that Messrs. Iglehart and Taylor have used all prudence and care with their docket in setting

The Evansville and Indianapolis Railroad Company v. Hawkins.

cases for trial in other counties with a view to be present at the trial of this cause on Tuesday, October 6th, 1885, the day on which said cause was set for trial;" that they entered on the trial of a cause in Vanderburgh county on Tuesday, October 1st, 1885; that "it was expected by all parties that the trial would be concluded before Saturday evening; that the trial is still in progress, and can not be concluded until after October 7th, 1885."

It is further stated in the affidavits that, "on Saturday, October 3d, Messrs. Iglehart and Taylor, finding the cause in Vanderburgh county would not be concluded for a day or two, nor for some days to come, caused a telegraphic message to be sent to Joseph C. Suit, counsel for plaintiff," and copies of the message and answer are set out.

It is contended by appellee's counsel that the refusal to continue will not be ground for reversal unless it clearly appears that injustice has been done and the discretion vested in the trial court plainly abused. The decided cases fully sustain this legal proposition. *Belck v. Belck*, 97 Ind. 73; *Whitehall v. Lane*, 61 Ind. 93; *Galvin v. State, ex rel.*, 56 Ind. 51.

In the two cases first cited the cause stated for a continuance was much the same as that stated in the affidavits before us, and they are, therefore, of controlling force. In view of the facts disclosed by the record and by the affidavits, we can not declare that the trial court abused the discretion vested in it by law. It is very often proper to postpone a case where counsel are engaged in other causes, and it is doubtless wise for the trial courts to be liberal in such cases; but the right to a postponement can not be regarded as an absolute one except in very strong and unusual cases. A plaintiff has a right to a speedy trial, and where, as here, the defendant has notice several days prior to the day appointed for trial that his regular attorneys can not attend, and has had in his service from the time of answering a "local attorney," it is his duty not to delay the plaintiff, but to pre-

The McCormick Harvesting Machine Company v. Scovell et al.

pare the local attorney to try the cause. It would often be a great hardship upon a party to postpone his cause because adverse attorneys are engaged in other causes, and it is only in cases presenting very unusual features that postponement for the reason that attorneys are professionally engaged can be claimed as a matter of right. This, certainly, is not such a case, for it is not an unusual one, and we can not hold that there was an abuse of discretionary power by the trial court.

The telegraphic correspondence did not mislead the appellant's counsel, for there is nothing in it justifying an inference that a motion for continuance would not be resisted.

Judgment affirmed.

Filed Sept. 28, 1887.

No. 12,976.

THE MCCORMICK HARVESTING MACHINE COMPANY v.
SCOVELL ET AL.

MORTGAGE. — *Husband and Wife.* — *Tenants by Entireties.* — *Suretyship of Wife.* — *Conveyances to Evade Statute Prohibiting.* — S. and wife owned land as tenants by entireties and the former was indebted. To evade the statute (section 5119, R. S. 1881) prohibiting a married woman from incumbering her property as surety, the land was conveyed to a trustee, who reconveyed it to the husband alone, after which it was mortgaged by the husband and wife to secure the former's antecedent debt, and then, through another trustee, reconveyed to the husband and wife as previously held. The mortgagee knew of the purpose of the conveyances.

Held, that under the statute mentioned the mortgage is void.

From the Hamilton Circuit Court.

A. F. Shirts and *G. Shirts*, for appellant.

T. J. Kane and *T. P. Davis*, for appellees.

ZOLLARS, C. J. — In January, 1885, as averred in the complaint, appellee Marion R. Scovell executed notes to appel-

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126	602
111	551
149	361
111	551
154	597
111	551
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The McCormick Harvesting Machine Company v. Scovell *et al.*

lant, and at the same time he and his wife, Adella M., to secure the payment of those notes, executed a mortgage to appellant upon real estate.

Appellant brought this action to recover judgment upon the notes and to foreclose the mortgage.

A joint answer was filed by appellees, and also a separate answer by the wife, Adella M. As those answers rest upon substantially the same facts, a brief extract of the separate answer by Adella M. will suffice. In that answer it is averred, in substance, that Adella M. was the wife of her co-defendant, Marion R. Scovell, at the time the mortgage was executed; that at the time of, and prior to, the execution of the mortgage, she and her husband owned and held the real estate covered by the mortgage as tenants by entireties; that on the day the mortgage was executed, and immediately prior to such execution, at the request of appellant, and without any consideration whatever, they executed a deed conveying the real estate to Walton Furnas, as trustee, who at once reconveyed the same to the husband; that immediately after such reconveyance the mortgage in suit was executed to secure an antecedent debt which the husband owed to appellant; that there was no consideration whatever for the deeds and mortgage except the securing of the husband's antecedent debt; that soon after the mortgage was executed the husband and wife conveyed the real estate to another trustee, who reconveyed it to them jointly as tenants by entireties, and that they are still such tenants; that Adella M. executed the mortgage as a security for the husband's antecedent debt to appellant, and for no other or different consideration, and that appellant, through its agents, had actual knowledge of all the facts as above stated.

The court below overruled demurrers to the answers. Those rulings are assigned as error.

It is settled in this State that, under the statute of 1881 (R. S. 1881, section 5119), a mortgage by a married woman upon her separate real estate to secure a debt of her hus-

The McCormick Harvesting Machine Company v. Scovell *et al.*

band, or any other person, may be defeated by her in a suit by the mortgagee, unless her conduct has been such as to work an equitable estoppel against her.

It is settled, also, that she may thus defeat such a mortgage when it is upon real estate which she owns with her husband as tenants by entireties. It is further settled, that when such a mortgage is upon real estate which she owns with her husband as tenants by entireties, it is thus voidable, not only as to her, but as to the husband also. *Dodge v. Kinzy*, 101 Ind. 102; *Crooks v. Kennett*, ante, p. 347; *Bridges v. Blake*, 106 Ind. 332. See, also, *Rogers v. Union Central Life Ins. Co.*, ante, p. 343.

The averments in the answers are not as certain and specific as the rules of good pleading require, but we think that it sufficiently appears that the deeds and mortgage were parts of one transaction, and that the purpose, and only purpose, of all the parties concerned, including appellant, acting through its agents, was to avoid the statute, *supra*, which prohibits a married woman from mortgaging her real estate as security for the debt of another.

Had the mortgage in suit been made direct to appellant, without the deeds mentioned in the answers, there could have been no question of its invalidity as to both of the appellees. It is a familiar rule of the law, that what can not be done directly may not be done indirectly. See *Jouchert v. Johnson*, 108 Ind. 436.

In our judgment the answers were sufficient, and the demurrer thereto was properly overruled.

Judgment affirmed, with costs.

Filed Sept. 27, 1887.

No. 13,718.

STEWART ET AL. v. THE STATE.

CRIMINAL LAW.—*Aiding in Escape of Prisoner.—Indictment.—Duplicity.—*

For an indictment for aiding in the escape of a prisoner, which is held to charge the felony defined in section 2029, R. S. 1881, and not the misdemeanor defined in section 2031, and also held not to be bad for duplicity as charging both offences, see opinion.

SAME.—*Instructions.—Refusal to Give.—Presumption.—*

Where the evidence is not in the record, or where the record does not affirmatively show that it contains all the instructions given by the court of its own motion, the Supreme Court will presume, in aid of the refusal of the trial court to give an instruction asked, either that such instruction was not applicable to the evidence, or that the law embraced therein had been given by the court of its own motion.

SAME.—*Giving Erroneous Instruction.—When Not Available Error.—*

The giving of an erroneous instruction is not available for the reversal of the judgment, where it appears that the substantial rights of the defendant were not prejudiced thereby.

SAME.—*Arraignment.—Irregularity.—*

A mere irregularity or informality in the arraignment of the defendant, which does not prejudice his substantial rights, is not available error.

From the Shelby Circuit Court.

L. F. Wilson, for appellant.

L. T. Michener, Attorney General, *A. F. Wray* and *J. H. Gillett*, for the State.

HOWK, J.—In this case the indictment charged “that, on the 13th day of November, A. D. 1886, at and in the county of Shelby, and State of Indiana, one Mollie Vancleave, a prisoner, who had been and then was tried and convicted in said county of a felony, to wit, of having, on the 22d day of September, 1886, at and in said county and State, unlawfully and feloniously blackmailed one Charles E. Karmire, and who then and there had been sentenced by said court to serve one year in the Indiana reformatory institution for women and girls, was duly and legally confined by James Magill, the sheriff of Shelby county, Indiana, in the jail of said county and State, and was then and there in the

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custody of said sheriff of Shelby county, Indiana, and the officer who was then and there charged with the custody of said Mollie Vancleave, said Mollie Vancleave being then and there in the custody of said officer under said conviction and sentence for said crime and felony aforesaid; and that David Stewart and Schuyler Stewart, not then and there being the officer or officers charged with the custody and safekeeping of said Mollie Vancleave, did, on the 13th day of November, 1886, then and there unlawfully, purposely and feloniously aid and assist the escape of said Mollie Vancleave from the custody of said sheriff and from said jail, by then and there unlawfully, purposely, knowingly and feloniously procuring and hiring a horse and buggy, and a man to furnish and drive said horse and buggy, and going with and directing said man, viz., Lincoln J. Van Buskirk, to a certain place in the city of Shelbyville, a short distance from said jail, and by giving signals to said Mollie Vancleave in said jail from the outside thereof, and waiting near said jail building, and then and there meeting said Mollie Vancleave at said jail and at an alley adjoining said jail, and conducting, accompanying, taking and directing her to where said Van Buskirk was, by their order and direction, awaiting for them, and assisting her to said buggy for the purpose of being conveyed therein, by their order and direction, out of and away from said county, with intent then and thereby to aid, assist and accomplish the escape of said Mollie Vancleave from the custody of said sheriff, and from said jail, and did then and there and thereby aid, assist and accomplish the escape of said Mollie Vancleave from the custody of said sheriff and from said jail, they, the said David Stewart and Schuyler Stewart, knowing that said Mollie Vancleave was then and there under conviction and sentence for said crime and felony aforesaid, and in the custody of said sheriff by reason thereof."

Upon appellants' arraignment and plea of not guilty the issues joined were tried by a jury, and a verdict was re-

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turned finding each of them guilty as charged, and that each be imprisoned in the State's prison for two years. Over their written motion to set aside the verdict herein, judgment was rendered against them thereon and in accordance therewith.

In this court, complaint is first made, on behalf of appellants, of the overruling by the trial court of their motion to quash the indictment herein. It is insisted by appellants' counsel that the indictment is bad for duplicity, in that it charges the appellants in a single count with the commission of two different and distinct offences defined in two different sections of the statute. It is settled by our decisions that duplicity, when it clearly exists, affords sufficient ground for sustaining a motion to quash an indictment or information. *Knopf v. State*, 84 Ind. 316; *State v. Weil*, 89 Ind. 286; *Fahnestock v. State*, 102 Ind. 156. But we do not think that the indictment, in the case under consideration, is at all open to the charge of duplicity. We have heretofore given the substance of the indictment herein, and it is manifest therefrom that it was intended to charge the appellants therein and thereby with the single specific offence against public justice which is defined, and its punishment prescribed, in section 2029, R. S. 1881. That section reads as follows: "Whoever, not being a person having the lawful custody of any prisoner charged with or convicted of a felony, shall aid or accomplish the escape of such prisoner, shall be imprisoned in the State prison not more than twenty-one years nor less than two years."

From the language used in the indictment in this case, it is clear, we think, that appellants are therein charged with the felony defined in section 2029, above quoted, almost in the exact terms of the statute; and this, under our decisions, makes the indictment sufficient to withstand the motion to quash it. *Ritter v. State*, *ante*, p. 324, and cases cited; *Trout v. State*, *ante*, p. 499. It is claimed, however, by appellants' counsel, that the language used in the indictment herein

aptly charges the appellants, also, with the commission of the mere misdemeanor which is defined, and its punishment prescribed, in section 2031, R. S. 1881. That section provides as follows: "Whoever aids or assists a person lawfully confined in any jail, workhouse, city prison, or other lawful place of confinement to escape therefrom or in an attempt to escape therefrom, * * * shall be fined not more than five hundred nor less than fifty dollars, and imprisoned in the county jail not more than one year nor less than three months."

By comparing the provisions of sections 2029 and 2031, *supra*, severally, with the language used in the indictment under consideration, it can not be doubted, as it seems to us, that it was intended to charge the appellants in such indictment with the felony defined in section 2029, *supra*, and not with the mere misdemeanor defined in section 2031, above quoted. We are of opinion, therefore, that the indictment herein is not bad for duplicity, and that appellants' motion to quash it on that ground was correctly overruled. *Mills v. State*, 52 Ind. 187.

The only other error properly assigned by appellants is the overruling by the court below of their motion to set aside the verdict herein. Under this alleged error it is first insisted, on behalf of appellants, that the trial court erred in refusing to give the jury, at their request, the following instruction:

"If you find from the evidence that Mollie Vancleave escaped from the county jail unassisted by the defendants, and that, after she had so escaped, she met the defendants, who accompanied her to another part of the city, where she got into a buggy and was driven off by one Van Buskirk, and that the defendants had nothing whatever to do for or with the said Mollie, in aid of her escape, until after she had so escaped, and had no previous knowledge that she intended to escape, then you must find for the defendants."

It may be that the trial court erred in refusing to give the

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jury the foregoing instruction, at appellants' request ; but if it did, the error is not so saved in and presented by the record now before us as to be available to appellants for the reversal of the judgment. The evidence is not in the record, and, therefore, we can not and do not know that the instruction quoted was not properly refused upon the ground that it was wholly inapplicable to the case made by the evidence. In such a case it is well settled that we must presume, in aid of the decision below, that the instruction asked was not applicable to the case made by the evidence, and was, for that reason, properly refused. *Louisville, etc., R. W. Co. v. Harrigan*, 94 Ind. 245, and cases cited.

Again, it is not shown affirmatively by the record of this cause that it contains all the instructions given the jury by the court of its own motion. In such a case we must also presume, in support of the ruling complained of, that the record of this cause does not contain all of the court's instructions to the jury, and that the instruction above quoted was properly refused by the court below, because the law of such instruction had been given the jury by the court of its own motion and in its own language. The record must affirmatively overcome or exclude all such presumptions, or the ruling complained of, even though erroneous, will not be available here for the reversal of the judgment. This is well settled by the decisions of this court. *Freeze v. DePuy*, 57 Ind. 188; *Myers v. Murphy*, 60 Ind. 282; *Bowen v. Pollard*, 71 Ind. 177; *Morris v. Stern*, 80 Ind. 227; *Town of Princeton v. Gieske*, 93 Ind. 102; *Frank v. Grimes*, 105 Ind. 346; *Becknell v. Becknell*, 110 Ind. 42.

The bill of exceptions, containing some of the instructions given by the court of its own motion, contains, also, the following recital or memorandum, to wit :

"Instruction No. 1, stating the law of the case, grade of punishment, and citing the statute under which the indictment was drawn, is lost from the files of the court."

Of course, the record of the cause filed here on this appeal

does not contain a transcript of "Instruction No. 1" of the court's instructions, nor any statement of its contents beyond what is contained in the recital or memorandum above quoted. It may be assumed, however, we think, from the language used by the court in its second instruction, given of its own motion, that in such "Instruction No. 1" the court directed the attention of the jury to the provisions of both the sections 2029 and 2031, above quoted, of our statute "concerning public offences and their punishment;" for, in its second instruction, the court, of its own motion, charged the jury as follows :

"You will observe from these statutes, in case you find the defendants guilty as charged, you have a wide discretion in assessing the punishment; and these two sections may be considered as one section, prescribing grades of punishment."

Appellants' counsel earnestly insists "that either this instruction was erroneous or the indictment was bad; and we care not which horn of the dilemma appellee may take." In other words, appellants' counsel claims, as we understand the point he makes, that, if the instruction last quoted contains a correct statement of the law, the indictment herein is clearly bad for duplicity, in that it charges the appellants in a single count with the felony defined in section 2029, and with the misdemeanor defined in section 2031, above quoted. Conceding, without deciding, that the instruction under consideration is erroneous, it does not follow by any means that the error therein is of such a character as would authorize or justify the reversal of the judgment.

As we have seen, the appellants were charged in the indictment herein with the felony defined in section 2029, *supra*, and not with the mere misdemeanor defined in section 2031, above quoted. By the instruction we are now considering, the jury were told that, if they found appellants guilty as charged, they might in their discretion assess against the appellants the punishment prescribed for the misdemeanor merely in such section 2031 of the statute. If the court

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erred, as claimed, in giving the jury this instruction, it is very certain, we think, that this error did not, and could not, in the nature of things, "prejudice the substantial rights of the defendants." In section 1891, R. S. 1881, of our criminal code, it is expressly declared that, "In the consideration of the questions which are presented upon an appeal, the Supreme Court shall not regard technical errors or defects or exceptions to any decision or action of the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant." In conformity with these statutory requirements and in obedience thereto, we must disregard the alleged error of the court below, if it be an error, in giving the instruction last above quoted, because such error, as we have already said, did not, and could not, in our opinion, "prejudice the substantial rights of the defendants" herein. This conclusion is in harmony with, and is sustained by, a number of our decisions. *Clayton v. State*, 100 Ind. 201; *Trout v. State*, 107 Ind. 578; *Phillips v. State*, 108 Ind. 406.

It is claimed on behalf of appellants, that the record fails to show their arraignment on the indictment herein, or that they entered any plea thereto. The order-book entry of the court below in the cause, appearing in the record, showed the arraignment of appellants upon the indictment herein, "and being each asked by the court whether he is guilty or not guilty, as therein charged, for plea thereto each says that he is not guilty." It was shown, also, on this subject, by bill of exceptions properly in the record, that "the court while in session directed Lee F. Wilson, Esq., the defendants' sole attorney, to take said indictment, read it to the defendants and advise them of the contents and charge in said indictment, and see how they desired to plead thereto; and that said Wilson then took said indictment, read the same to the defendants, advised and consulted with the said defendants and returned into court; that the court thereupon said to Wilson, in the presence of the defendants, 'How do

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you plead to this indictment?' Whereupon said Wilson, in the presence of said defendants, then and there in open court, in response to said question of the court, replied: 'We plead not guilty;' and that appellants were not otherwise arraigned on the indictment herein, and did not otherwise plead thereto, except as stated in such bill of exceptions.

Upon the showing made in the bill of exceptions, it may be said that the arraignment of the appellants on the indictment herein was irregular and informal, but their plea thereto was properly entered by their attorney in their behalf. The cause was tried upon issues duly joined, and certainly there was no error in the arraignment of appellants, or in their plea to the indictment, which did or could, in our opinion, prejudice their substantial rights in this cause in the slightest degree.

In conclusion, we are of opinion that no error is so saved in and presented by the record of this cause as to authorize or require the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Sept. 28, 1887.

No. 13,686.

THE MIDLAND RAILWAY COMPANY v. WILCOX ET AL.

APPEAL BOND.—*Supreme Court can not Increase Penalty.*—*Solvency of Sureties.*

—*Change in Financial Condition.*—The Supreme Court can not increase the penalty of an appeal bond as fixed by the trial court; nor will it interfere with the decision of that court as to the sureties' solvency and ability to pay, unless it is shown that there has been a change in the condition of the parties or sureties.

From the Madison Circuit Court.

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The Midland Railway Company v. Wilcox *et al.*

H. Crawford, D. C. Chipman and M. A. Chipman, for appellant.

F. M. Trissal, A. F. Shirts and G. Shirts, for appellees.

ELLIOTT, J.—The trial court fixed the penalty of the appeal bond and approved the sureties offered by the appellant, and in our opinion we can not increase the penalty of the bond nor adjudge that the security is not adequate.

There is no showing that there has been any change in the situation of the parties or in the financial condition of the sureties on the appeal bond, and it is, therefore, not proper for this court to annul the decision of the trial court upon these questions.

The forum in which to try the question of the sufficiency of the penalty of an appeal bond, in a case appealed in term, is the court which is called upon to receive and approve the bond. There the question must be determined. R. S. 1881, section 638.

The question as to the solvency and ability of the sureties is one that the trial court must determine, and its judgment on this, as on other questions of fact, will be respected by the Supreme Court. It is in the trial court, and not on appeal, that such questions must be tried and determined.

Where a change in the condition of the parties or the sureties occurs, then the Supreme Court may properly interfere; otherwise the judgment of the trial court must stand.

Motion for additional bond overruled.

Filed June 29, 1887.

Coleman v. The State.

No. 13,898.

COLEMAN v. THE STATE.

CRIMINAL LAW.—*Misconduct of Prosecuting Attorney.—Opening Statement.—*

Testimony of Defendant.—Waiver of Error.—Where a prosecuting attorney in his opening statement to the jury uses the following language: “ You should watch the evidence closely. We do not know that the defendant will go upon the stand. He has not been sworn; I noticed that. If he should go upon the stand you should watch —,” he thereby palpably violates the spirit and purpose of the statute governing the testimony of defendants in criminal cases; but where the court sustains an objection to the use of such language, and the same is withdrawn from the jury, the error is not available if the defendant proceeds to the end of the trial without further objection.

SAME.—*Practice.—Error Waived.*—A defendant in a criminal case, who has knowledge of the misconduct or incompetency of a juror, or other matter, not affecting the jurisdiction of the court, which would vitiate the trial, yet proceeds with the trial to its conclusion, without objection, will not be heard afterwards to object that the proceeding was vitiated thereby.

SAME.—*Prosecuting Attorney.—Misconduct of.—Practice.—Motion to Set Aside Submission.*—Where the prosecuting attorney, in his opening statement, is guilty of misconduct prejudicial to the substantial rights of the defendant, the latter, in order to avail himself of the error, must move to set aside the submission and discharge the jury.

SAME.—*Assault with Intent to Commit Rape.—Witness.—Absence of Prosecutrix.—Instruction.*—In a prosecution for assault with intent to commit rape, where the testimony of the prosecutrix is accessible to both parties, it is not error for the court to refuse to instruct the jury that her failure to appear at the trial, and the failure of the State to account for her absence, were circumstances proper to be considered by them as tending to show that no crime had been committed.

SAME.—*Reasonable Doubt.—Instruction.*—In the trial of a criminal cause, where the jury has been instructed that before they can return a verdict of guilty they must find from the evidence, and be convinced of the defendant’s guilt beyond a reasonable doubt, it is not error to refuse an offered instruction “ that it is better that ten guilty persons escape than that one innocent suffer.”

From the Jasper Circuit Court.

E. P. Hammond, M. F. Chilcote and W. B. Austin, for appellant.

L. T. Michener, Attorney General, R. W. Marshall, Prosecuting Attorney, and J. H. Gillett, for the State.

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MITCHELL, J.—Coleman was tried in the Jasper Circuit Court and sentenced to two years imprisonment for having feloniously assaulted one Ida Ream, with intent to commit a rape upon her person.

The error assigned brings before us the propriety of the ruling of the court in overruling the appellant's motion for a new trial.

As the learned counsel for the appellant suggest, the case is somewhat peculiar, in that the person upon whom the injury is alleged to have been committed does not appear to have been examined as a witness. It is, however, beyond successful dispute that the verdict is well supported by other competent evidence. It may be inferred from the record that the State sought, without success, to obtain a continuance on account of the absence of the prosecutrix.

That the appellant without right invaded the room in which the prosecutrix was pursuing her work, as chambermaid, and that he made an indecent proposal to, and perpetrated an unlawful assault upon her, is scarcely denied. There was testimony to the effect that he was seen violently struggling with the girl, thrusting one hand under her garments, the other arm about her neck, while with his hand he tried to cover her mouth, so as to prevent her from making outcry. Her resistance and outcries attracted the attention of others, one of whom witnessed the parties in the struggle, and whose presence, when observed, caused the appellant to desist. The girl left the room crying. That the appellant's purposes in intruding into the room were lecherous is not denied, and it is not at all surprising that the jury refused to adopt the theory that what he did was merely with a view to persuade the prosecutrix to yield to his lustful passion.

There was an unlawful assault upon the prosecutrix, who resisted from the beginning and made outcry. The jury drew the inference, as well they might from the evidence, that the assault was made with the felonious intent to have

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carnal knowledge of the girl by force and against her will, if it became necessary to the accomplishment of his purpose that force should be employed. We can not disturb the finding on the evidence.

It appears from a bill of exceptions, that in making the opening statement of the case the prosecutor used the following language in addressing the jury: "You should watch the evidence closely. We do not know that the defendant will go upon the stand. He has not been sworn; I noticed that. If he should go upon the stand you should watch—." At this point counsel for the defendant objected and excepted to the statement so made.

The court sustained the objection, whereupon the prosecutor said: "Very well; under the ruling of the court, I will suspend further remarks on that subject, and I withdraw the statement from the jury."

The bill of exceptions also recites, and the record shows, that the defendant subsequently testified as a witness in his own behalf.

For the appellant it is contended, with much force and plausibility, that in using the language above set out the prosecutor was guilty of such misconduct as constituted incurable error, which was not waived, notwithstanding the defendant proceeded to the end of the trial without further objection, and without exception to any adverse decision of the court involving the alleged misconduct of the prosecuting attorney.

Section 1798, R. S. 1881, provides, among other things, that a defendant in a criminal case shall be a competent witness, and that if he "do not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause, nor commented upon, referred to, or in any manner considered by the jury trying the same;" and it is made the duty of the court "in such case in its charge, to instruct the jury as to their duty under the provisions of this section."

Much has been, and much more might be, said concerning

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the policy of statutes under which defendants in criminal cases are admitted to testify as witnesses. Upon that subject, however, it is not necessary that we should enlarge. The objectionable remarks of the prosecuting attorney, although made in his opening statement to the jury, and, therefore, not directly controlled by the rulings in *Long v. State*, 56 Ind. 182 (26 Am. R. 19), and *Showalter v. State*, 84 Ind. 562, and although not within the literal prohibition of the statute, were, nevertheless, in palpable violation of its spirit and purpose. Surely, if the failure of the defendant to testify is not to be a subject of comment, or may not be referred to in the argument of the cause, nor commented upon, or referred to or considered by the jury, the prosecutor may not evade the statute by ingeniously injecting into his opening statement remarks which do all the mischief which the prohibitory part of the statute was intended to prevent. The effect of the remarks must have been either to coerce the defendant to testify, as has been said, "with a halter about his neck," or to induce him to remain silent, with knowledge that the jury had been challenged in the outset to observe whether or not he would go upon the stand, under the goad of the prosecutor's statement.

But, conceding the impropriety of the prosecutor's conduct, since in this case the court promptly sustained the appellant's objection, and such reparation as could be was made on the spot, the court denying nothing which the appellant asked in that connection, the question still remains: Did the conduct of the prosecutor constitute an error so radical and incurable that it was not, and could not be, waived by the defendant by proceeding, without further objection or motion, to an adverse ending of the trial?

To affirm this proposition would put it in the power of a defendant to compel a second trial, at his election, whenever a prosecutor at any stage, either by inadvertence or otherwise, violated the spirit of the statute under consideration. This, too, notwithstanding the trial court may have done its

utmost to rectify the mistake, and may have made no ruling or decision in that connection adverse to the defendant, or to which he took any exception. It seems difficult to discover any principle which would allow a defendant, in case of misconduct on the part of any one which would necessitate a new trial, to proceed without objection to the end of a protracted trial, availing himself of every opportunity to secure a favorable result, after becoming fully aware of such misconduct, and yet hold in reserve an absolute right to have the verdict set aside in case it did not suit him.

The authorities uniformly declare the rule to be that, except as to matters involving the jurisdiction of the court over the subject-matter, if a party have knowledge of a matter which will frustrate the trial in the end, he must avail himself of the earliest opportunity to arrest the proceeding or he will be deemed to have waived his right to object when the end is reached. He will not be permitted to go on without objection, taking his chances of ultimate success, and afterwards go back and impeach the trial in case he is disappointed at the result.

Misconduct on the part of the prosecutor is not different in principle or effect from misconduct on the part of a juror or other person connected with the trial. It is a settled rule, that a person having knowledge of the misconduct or incompetency of a juror, or of any other matter, not affecting the jurisdiction of the court, which would vitiate the trial, who nevertheless proceeds to a conclusion without objection, will not afterwards be heard to object that the trial was vitiated thereby.

This subject was exhaustively considered and the authorities reviewed in the recent case of *Henning v. State*, 106 Ind. 386 (55 Am. R. 756).

In the case under consideration the objectionable remarks of the prosecutor were made immediately after the jury were empanelled, at the very outset of the trial.

If the court had, of its own motion, set aside the submis-

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sion and discharged the jury without the appellant's consent, jeopardy having attached, it might well have been claimed that he was entitled to an acquittal.

To have made available error, the trial court should have been afforded an opportunity to eliminate the error, by ruling upon a motion to arrest the further progress of the case. True, there was an objection and an exception to the statement of the prosecutor, but the court sustained the objection, and under its ruling the objectionable statement was withdrawn. There was, therefore, no ruling or decision of the court to which an exception was or could have been saved. Section 1845, R. S. 1881.

Our conclusion, therefore, is that, in the absence of a motion by the defendant to set aside the submission and discharge the jury, there was no available error in refusing the motion for a new trial on account of the alleged misconduct of the prosecuting attorney in making his opening statement.

The refusal of the court to instruct the jury to the effect that the failure of the prosecutrix to appear at the trial, and the failure of the State to account for her absence, were circumstances proper to be considered by the jury, as tending to show that no crime had been committed, is complained of as reversible error.

Section 1823, R. S. 1881, makes it the duty of the court in charging the jury to "state to them all matters of law which are necessary for their information in giving their verdict."

The instruction refused can hardly be said to embrace any matter or proposition of law. It tended rather to invite the jury to infer as a matter of fact that the absence of the witness, unaccounted for by the State, although from aught that appears she was equally accessible to the defendant, was to be or might be considered as a circumstance tending to raise a presumption of innocence. It is always of doubtful propriety for the court to instruct the jury in such a way as to

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cause them to conclude that from the absence of certain evidence or facts they may infer certain other facts. *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63.

This pertains rather to the argument of the cause than to a statement of the law of the case. Besides, as was said in *Haymond v. Saucer*, 84 Ind. 3 (13), "The failure to produce a witness, who might as well be called by one party as the other, is no reason for indulging a presumption against either party."

Where one party alone is so situated that he can offer evidence of all the facts and circumstances surrounding a transaction, the failure to produce such evidence, where it is not accessible to the other party, or the suppression or destruction of evidence which is accessible to one party and not to the other, may sometimes be considered as a circumstance against the party to whom alone the evidence is accessible. *Commonwealth v. Webster*, 5 Cush. 295.

But this rule, which is to be cautiously applied in any case, has no application where the evidence is equally within the reach of both parties. *State v. Rosier*, 55 Iowa, 517. There was no error in refusing the instruction.

The court having adequately instructed the jury that before they could return a verdict of guilty they must find from the evidence, and be convinced of the defendant's guilt beyond a reasonable doubt, it was not error to refuse the defendant's request to instruct that it was better that "ten guilty persons escape than that one innocent suffer."

So far as the other instructions refused stated the law correctly, they were substantially embraced in those given by the court.

There was no available error. The judgment is affirmed, with costs.

Filed Sept. 27, 1887.

KNOPF v. MOREL.

PLEADING.—*Complaint.—Surplusage.*—Statements of facts in a complaint, which are in themselves material and relevant to the cause of action, can not be regarded as surplusage, although they overthrow the pleading.

SAME.—*Repugnant Allegations.*—Where a complaint contains material and relevant facts, which constitute a defence to the action, it is bad on demurrer.

JUDGMENT.—*Suretyship.—Contribution.—Collateral Attack.*—Where a valid judgment has been rendered against several defendants, in which the question of suretyship between them has been determined, a suit for contribution afterwards brought by one of such defendants is a collateral attack on the judgment, and will fail.

SAME.—*Evidence.—Reversible Error.*—Parol evidence attacking a judgment which the record thereof on its face shows to be void, though incompetent, does not prejudice nor impair the rights of the party claiming under such judgment, and the admission of such evidence is not reversible error.

PRINCIPAL AND SURETY.—*Judgment Defendants Primarily Liable.—Establishment of Suretyship.*—Parties against whom a judgment is taken are deemed primarily liable, unless the judgment determines the question of suretyship, though after judgment one who occupies the relation of surety may have the fact judicially established, and an order for an execution in his favor.

SAME.—*Co-Sureties.—Jurisdiction.*—Jurisdiction to determine the rights of the plaintiff as against the defendants is not jurisdiction to determine the rights of the defendants on the question of suretyship, and does not of itself authorize an adjudication on that subject.

SAME.—To secure a judicial determination of the question of suretyship, proper steps must be taken to invest the court with jurisdiction, and jurisdiction is not conferred by a complaint upon an instrument which does not on its face fully disclose the relation of the parties.

SAME.—*Question of Suretyship an Independent One.—General Rule.—Exception.*—The question of suretyship, so far as it affects the rights of the debtors between themselves, is an independent one, and is not as a general rule determinable upon the complaint, although there are cases where the complaint so fully discloses the facts as to give jurisdiction to adjudicate upon questions of suretyship without process issuing upon the cross-complaint, and even without a cross-complaint. *Githens v. Kimmer*, 68 Ind. 362, limited.

SAME.—*Endorser.—Establishment of Suretyship.*—An endorser can not have a judgment conclusively establishing suretyship upon the complaint of the plaintiff on a promissory note upon which, from the position of his

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117 148

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152 583
152 584

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name upon the instrument, he *prima facie* appears as surety, without bringing the makers into court upon the question of suretyship.

SAME.—*Judgment Determining Suretyship Without Proper Pleadings Void.*—

A judgment rendered in an action before a justice of the peace, where the only complaint is a promissory note bearing the names of two makers on the face thereof and the name of another on the back, which assumes to determine the question of suretyship by adjudging the party whose name is on the back of the note to be surety, there being no pleadings filed raising such question, is invalid so far as it assumes to settle the question of suretyship, and is no bar to a subsequent action for contribution against the party so adjudged to be surety.

SAME.—*Endorser.—Liability of.—Presumption.—Evidence.*—An endorser is not presumed to be a co-surety of one who signs as maker of a note, but parol evidence is admissible to prove that he did sign as co-surety.

SAME.—*Contribution.—Endorser.—Co-Sureties.—Pleading.—Complaint.*—In an action for contribution, by one claiming to be surety on a promissory note upon which judgment has been rendered against an endorser who it is alleged was the co-surety of the plaintiff, it is sufficient to allege in the complaint that they were co-sureties, and that neither received any part of the consideration, without an averment that there was any contract between the parties establishing the relation claimed.

SAME.—*Co-Sureties.—Contract Between Endorser and Maker.—Evidence.—Admission by Conduct.*—In an action for contribution by one claiming to be surety, seeking to establish the relation of co-suretyship between himself and one claiming to be endorser merely, evidence tending to show that the latter had entered into an agreement with the maker, after the execution of the note, that such maker should pay him five dollars each week, and that under such agreement he had received fifteen dollars, is admissible, not for the purpose of charging the defendant with the money received, but as an admission by conduct.

SAME.—The fact that an endorser of a promissory note received money from the principal to apply on the note is not of itself sufficient to entitle one who signs as maker to contribution. The endorser is bound to apply the money so received to a reduction of the debt, but his position is not thereby changed to that of a co-surety.

From the Wayne Superior Court.

C. H. Burchenal, for appellant.

S. A. Forkner, H. C. Fox and J. F. Robbins, for appellee.

ELLIOTT, J.—It is alleged in the first paragraph of the complaint that, on the 28th day of February, 1876, August Emerick executed a promissory note to George Buhl for

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one hundred dollars; that the appellee, Morel, signed it as surety; that the appellant, Knopf, endorsed the note as the co-surety of appellee; that no part of the consideration was received by any of the sureties; that, on the 5th day of September, 1876, judgment was recovered in an action on the note, brought before a justice of the peace, against Louis Knopf, Emerick and the appellee; that the judgment was rendered upon default; that, "through inadvertence, mistake, or otherwise, the court found that Louis Knopf was surety for Emerick and the plaintiff, and so rendered judgment;" that the only evidence and pleadings in the cause was the original note; that the appellee was not aware of the judgment until more than thirty days after it had been rendered; that the appellee did pay the judgment, and that Emerick is insolvent. Prayer that Knopf be compelled to contribute.

The appellant's counsel argues that this paragraph of the complaint is bad, because "it shows that there was a finding and judgment that the appellant was surety for the appellee." To break the force of this argument appellee's counsel assert that the statements respecting the judgment of the justice are mere surplusage, and do not vitiate the pleading. Our opinion is against the appellee on this point. The statements of the pleading are of material facts, and can not be disregarded. If it is true that there was a valid judgment, then the complaint is bad, and the statements are relevant and material. Statements in themselves material and relevant to the cause of action can not be regarded as surplusage, although they overthrow the complaint.

Where a pleader, in stating the facts of his cause of action, states material and relevant facts constituting a defence, he makes his pleading bad. He is not bound to anticipate the defence; but, if he does undertake to do so, and states facts constituting a defence, his pleading will fall before a demurrer. *Behrley v. Behrley*, 93 Ind. 255; *Calvo v. Davies*, 73 N. Y. 211.

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It follows from the propositions stated that the controlling question is, whether the judgment of the justice is a bar to this suit for contribution, and it must be regarded as a bar unless it was void so far as it attempted to determine the question of suretyship. If it was not void, then it is invulnerable against this attack, for a suit for contribution is a collateral attack, and only void judgments yield to such attacks.

It is settled that the question of suretyship must be determined by a judicial decision. Parties to an instrument upon which suit is brought may have the question of suretyship determined, but until it is determined they can not claim the statutory rights of sureties. This is illustrated by the case of *Montgomery v. Vickery*, 110 Ind. 211, where it was held that parties against whom a judgment is taken are deemed primarily liable unless the judgment determines the question of suretyship. In that case the original judgment did not determine the question of suretyship, and it was held that, until that question is judicially settled, the parties must be regarded as primarily liable on the original judgment. It was also held in that case, that the original judgment not having determined that question, its determination in a subsequent suit was conclusive at least as against a collateral attack, and it was said: "It has been repeatedly held that even after judgment one who occupies the relation of surety may have that fact established and an order for an execution in his favor. *Scherer v. Schutz*, 83 Ind. 543; *Harker v. Glidewell*, 23 Ind. 219; *Bowser v. Rendell*, 31 Ind. 128."

It is clear, therefore, that the parties in the action before the justice of the peace might have asked and obtained a decision of the question of suretyship, for the justice would, if he had obtained jurisdiction of the persons of the parties upon the question of suretyship, have had authority to adjudicate that question. It is, however, essential that jurisdiction of the parties should extend to the question of suretyship between those liable on the instrument sued on, inasmuch as

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jurisdiction of the complaint of the plaintiff does not in itself authorize an adjudication upon the rights of the defendants among themselves. Jurisdiction to determine the rights of the plaintiff as against the defendants is not jurisdiction to determine the rights of the defendants on the question of suretyship. As decided in *Montgomery v. Vickery, supra*, and in many other cases, the defendants are all primarily liable on the judgment unless the judgment itself, or some other judicial decree, otherwise orders, and this order can only be made where there is jurisdiction of the person as well as of the subject-matter. The parties have a right, in the proper case, to a judicial determination of the question of suretyship, and a judgment where there was jurisdiction would undoubtedly be conclusive; but, to secure this judicial decision, proper steps must be taken to invest the court with jurisdiction. This jurisdiction is not conferred by a plaintiff's complaint upon an instrument which does not on its face fully disclose the relation of the parties. The question of suretyship so far as it affects the rights of the debtors between themselves is an independent one, and is not, as a general rule, determinable upon the complaint of the plaintiff. In *Joyce v. Whitney*, 57 Ind. 550, it was held that a decree rendered on the complaint of the plaintiff alone declaring some of the defendants sureties for the others "was invalid and void on its face," and this is the general rule maintained by our cases. *Johnson v. Meier*, 62 Ind. 98, 101; *Baldwin v. Webster*, 68 Ind. 133; *Swift v. Brumfield*, 76 Ind. 472; *Douch v. Bliss*, 80 Ind. 316; *Montgomery v. Vickery, supra*; *Bliss v. Douch*, 110 Ind. 296.

In *Githens v. Kimmer*, 68 Ind. 362, the complaint showed a judgment on the question of suretyship in favor of the plaintiff who sought to enforce contribution; but, in that case, the plaintiff relied on the fact that he was surety and not on the judgment, so that the decision must be so limited as not to be regarded as in conflict with the decisions we here cite. All that was decided in that case is embodied in

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this statement: "The court erred in sustaining the demurrer to the complaint. *Joyce v. Whitney*, 57 Ind. 550."

We have ascertained the general rule, and it only remains to inquire whether it controls this case. There are, doubtless, cases where the complaint so fully discloses the facts as to give jurisdiction to adjudicate upon all questions without process issuing on the cross-complaint, and, indeed, without a cross-complaint. *Bevier v. Kahn*, ante, p. 200. If this case can be regarded as belonging to that class, then the judgment was not void; but the difficult question is, does it belong to that class of cases?

It is true that *prima facie* the relation of Knopf is that of an endorser. *Browning v. Merritt*, 61 Ind. 425. But this was only *prima facie* so as against the appellee. In *Porter v. Waltz*, 108 Ind. 40, the appellant signed, "J. C. Long, security for the three above parties," and it was held that this was not conclusive of the rights of the other makers. It was there said: "The rights and liabilities of sureties depend ultimately upon the relation which each sustained to the other and to the transaction, as well as upon the contract between themselves. * * *Schooley v. Fletcher*, 45 Ind. 86; *Bowser v. Rendell*, 31 Ind. 128; *Lacy v. Lofton*, 26 Ind. 324; *Horn v. Bray*, 51 Ind. 555 (19 Am. Rep. 742); *Nesbit v. Knowlton*, 51 Ind. 352." This doctrine applies here.

An endorser can not have a judgment conclusively establishing suretyship upon the complaint of the plaintiff on a promissory note upon which, from the position of his name on the instrument, he *prima facie* appears as surety. In such a case, by taking the proper steps, he might have that question litigated, and the note would, perhaps, be *prima facie* evidence in his favor. *Hoffman v. Butler*, 105 Ind. 371. But, without bringing the makers into court upon the question of suretyship, the endorser can not, upon a mere inspection of the note, have that question conclusively determined. In this case the note was not payable to the endorser, but to George Buhl, the plaintiff in the original action, and it was

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competent, therefore, for the parties to show the actual relation between them. *Vore v. Hurst*, 13 Ind. 551; *Browning v. Merritt*, *supra*. It must result, as a necessary and logical consequence, that, as the right existed to show the actual relation of the parties, the appellee could not be concluded by a judgment in which that question could not have been legally litigated.

It is asserted that the first and second paragraphs of the complaint are bad, because they do not aver that there was a contract establishing the relation of co-sureties. We think, however, that the facts alleged sufficiently show this relation, for it is averred that they were co-sureties, and that neither received any part of the consideration. It is true that an endorser is not to be presumed to be a co-surety of one who signs as maker. *Dunn v. Sparks*, 7 Ind. 490. But parol evidence is admissible to prove that he did sign as co-surety. *Brandt Suretyship*, sections 225, 226; *Dunn v. Sparks*, *supra*; *Harshman v. Armstrong*, 43 Ind. 126. It was, therefore, competent to allege that Knopf was the appellee's co-surety, and the only question is, was it necessary to set forth any contract? We think it was not. Our opinion is that it was sufficient to allege that he was a co-surety without stating the contract between the parties. This we must hold or overrule the decision in *Githens v. Kimmer*, *supra*. That the relation of co-surety did exist was a fact, and the contract and details of the transaction were the evidence to establish that fact. Evidence need not and should not be pleaded. It is not always an easy task to define the line between the facts and the evidence of facts; but, from an examination of our cases, we conclude that it must be held that it is enough to aver that the party was a surety, and received no part of the consideration. *Bliss Code Pleading*, section 206.

As we regard the proceedings before the justice, so far as they affected the question of suretyship, as void, we do not deem it necessary to consider in detail the questions arising on the admission of the evidence of the justice. The evi-

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dence was of such a character as not to prejudice the substantial rights of the appellant; for, if the proceeding was entirely destitute of force, it can not be that evidence tending to prove by parol what ought to have been proved by the record could have harmed the appellant. As the record, on its face, showed that the proceeding was void, evidence tending to establish the same thing, even if incompetent, did not impair the rights of the appellant, since from a void judgment no legal right could flow.

There was no error in permitting the appellee to prove that the appellant and Emerick, after the execution of the note, entered into an agreement that the latter should pay the former five dollars each week, and that, under this agreement, the sum of fifteen dollars was paid. This testimony tended to prove that the appellant was liable on the note as surety, and in that capacity had received money from his principal, although in itself it was not sufficient to accomplish that result. We do not think that the testimony was admissible for the purpose of charging the appellant with the money he received, for there was no allegation in the complaint on that subject; but we do think the evidence was competent, because it is to be regarded as an admission by conduct.

We have carefully studied the evidence, and we can not resist the conclusion that the trial court erred in applying the law to it. Knopf signed as an endorser, and, as we have seen, was *prima facie* liable in that capacity. We can find no evidence that he undertook in any other capacity, although we have given it the most careful scrutiny. The uncontradicted evidence is, that he refused to sign as maker, and there is no evidence that he agreed to be held as a co-surety. In the absence of evidence showing that he undertook as co-surety he can not be compelled to contribute. *Schulz v. Klenk*, 49 Ind. 212; *Nurre v. Chittenden*, 56 Ind. 462; *Hillegas v. Stephenson*, 75 Mo. 118 (42 Am. Rep. 393); *Smith*

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v. *Smith*, 1 Dev. Eq. (N. C.) 173; *Briggs v. Boyd*, 37 Vt. 534.

Evidence of the fact that the endorser received money from the principal to apply on the note is not, of itself, sufficient to entitle one who signs as maker to contribution. This is obviously so, because the endorser is liable to the creditor, and has a right to protect himself by taking money from the debtor without changing his position. He is, to be sure, bound to apply the money so received to a reduction of the debt, but he does not change his position to that of a co-surety.

Judgment reversed.

Filed Sept. 27, 1887.

111	578
119	454

111	578
127	108

111	578
150	247

111	578
150	646
150	647

No. 11,906.

AMICK v. BUTLER, ADMINISTRATOR.

LIFE INSURANCE.—*Insurable Interest.*—No one can have the benefit of an insurance effected by himself upon the life of another, unless he has an insurable interest in the life insured.

SAME.—*Creditor's Insurable Interest in Life of Debtor.*—*Amount of Insurance Permissible.*—A creditor has an insurable interest in the life of his debtor, and may in good faith take insurance upon his life. The amount of the insurance obtained must bear some just proportion to the debt, or the extent of the obligation assumed, and the contingencies attending the maintenance of the policy, though it can not be limited to the amount of the debt.

SAME.—*Liability of Creditor for Surplus After Payment of Debt.*—Where money has been collected upon a policy of insurance which had its inception in a scheme of mere speculation on the life of the insured, or where insurance is taken out by a debtor as security for the benefit of his creditor, the expense of procuring and continuing the policy being borne by the former, the amount collected, less the debt secured or the sums advanced in obtaining and keeping the policy in force, may be recovered by the personal representatives of the person insured.

SAME.—*When Creditor Entitled to Full Amount of Policy.*—Where a creditor receives from his debtor a policy of insurance on the life of the latter,

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paying all the expenses attending the issuance thereof, and all subsequent assessments and charges thereon, and being named therein as beneficiary, and upon the death of the debtor receives the amount stipulated therein, which is largely in excess of the indebtedness and the expenses of insurance paid by him, he is not liable to the representatives of the debtor for such excess, although it had been agreed between the parties that if the debtor should pay the indebtedness and the expense of insurance the policy should be turned over to him.

From the Jennings Circuit Court.

J. Overmyer, for appellant.

T. C. Batchelor, for appellee.

MITCHELL, J.—Suit by Butler, administrator of the estate of Frazee, deceased, against Amick, to recover part of the amount which the latter received on a policy of life insurance which had been effected on the life of the plaintiff's decedent.

The facts most favorable to the plaintiff's theory are comprised in the following statement: On the 23d day of March, 1877, Decatur M. Frazee was indebted to Amick in the sum of about six hundred dollars. By agreement with Amick, Frazee made an application to the U. B. Mutual Aid Society of Pennsylvania, a mutual life insurance company, for membership in that society. Upon due examination he was admitted as a member, receiving a certificate in which Amick, his heirs and assigns, were designated as the beneficiaries, and were to become entitled upon the death of Frazee to two thousand dollars, upon condition that the terms and conditions of the certificate of membership should be complied with. Amick was designated in the application and in the certificate of membership as a creditor. The amount of the indebtedness was erroneously stated in the application at two hundred and fifty dollars. The proof showed that it was about six hundred dollars. All the expenses incident to the issuance of the certificate, and all the annual payments and assessments stipulated in the certificate of membership to be paid by Frazee, were to be and were paid by Amick. At the

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time the policy was issued it was orally agreed that if Frazee should at any time thereafter pay his indebtedness, and reimburse Amick for the cost of obtaining the policy and carrying the insurance, the latter would turn over the policy to the former.

On the 16th day of April, 1879, Frazee died without having paid any part of his debt, and without having paid any part of the cost of procuring and continuing in force the certificate of membership.

The society, upon due proof of the death of Frazee, paid to Amick about nineteen hundred and sixty-three dollars, in discharge of its liability upon the certificate. After deducting the amount of the indebtedness and the sums advanced for the insurance, it was found that there remained of the sum received from the society twelve hundred and fifty-nine dollars and fifty-eight cents, which the administrator of Frazee had demanded from Amick. The latter having refused payment, the court gave judgment in favor of the administrator for the amount.

The propriety of the conclusion of the learned court on the foregoing facts involves all the questions in the record.

In support of the judgment so given, it is contended that the right of a creditor in the proceeds of a policy of insurance upon the life of his debtor, is limited to the amount of the debt and necessary expenses on account of which the insurance was taken out and maintained. When the debt and expenses are extinguished, the argument is, the excess belongs to the legal representative of the deceased debtor, and may be recovered from the creditor, to whom payment has been made, as money had and received to the use of the debtor's representative.

This conclusion is predicated upon the rule, the effect of which is that one having no insurable interest in the life of another may not, by means of insurance, speculate upon the life of the person insured. The insurable interest can not,

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it is contended, exceed the amount of the debt; hence, the person obtaining the insurance must account for the excess.

Upon considerations of public policy, the general rule has long prevailed that insurance taken out and obtained by one upon the life of another, in whose life the person procuring the insurance had at the time no insurable interest, is invalid. *Elkhart, etc., Ass'n v. Houghton*, 103 Ind. 286 (53 Am. R. 514); *Continental Life Ins. Co. v. Volger*, 89 Ind. 572 (46 Am. R. 185).

A policy taken upon the life of another, for speculative purposes merely, is regarded as nothing more than a wager on the life of the person insured. Such a transaction is assigned a place in the catalogue of gambling, and is justly condemned by the law. *Ruse v. Mutual Benefit, etc., Co.*, 23 N. Y. 516; *Brockway v. Mutual Benefit, etc., Co.*, 9 Fed. Rep. 249; *Bliss Life Ins.*, section 9.

No one can have the benefit of an insurance effected by himself upon the life of another, unless he has an insurable interest in the life insured.

Where money has been collected upon a policy which had its inception in a scheme of mere speculation upon the life of the person who is the subject of insurance, or where insurance is taken out by a debtor as a security for the benefit of his creditor, the expense of procuring and continuing the policy being borne by the former, the authorities justify the conclusion in either case that the amount collected, less the debt secured or the sums advanced in obtaining and keeping the policy in force, may be recovered by the personal representatives of the person insured. *Gilbert v. Moose*, 104 Pa. St. 74 (49 Am. R. 570); *Cammack v. Lewis*, 15 Wall. 643; *Page v. Burnstine*, 102 U. S. 664; *Warnock v. Davis*, 104 U. S. 775; *Dutton v. Willner*, 52 N. Y. 312; *Drysdale v. Piggott*, 8 DeGex, M. & G. 546; *Lea v. Hinton*, 5 DeGex, M. & G. 823.

In case the policy originates in a transaction which the law condemns, or where the debtor, having taken insurance on

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his own life, at his own expense, merely pledges the policy as a security for an existing debt, the holder, whether by assignment or otherwise, who receives the entire proceeds, will be regarded as a trustee of the representatives of the insured for the amount received, less the amount of his debt, or the sum advanced on the policy. *American Life, etc., Co. v. Robertshaw*, 26 Pa. St. 189; *Matthews v. Sheehan*, 69 N. Y. 585.

Thus, in *Bruce v. Garden*, 5 Ch. App. C. 32, the language of Lord HATHERLEY is: "The court requires distinct evidence of a contract—that the creditor has agreed to effect a policy, and that the debtor has agreed to pay the premiums, and in that case the policy will be held in trust for the debtor."

The case under consideration is not within the facts, and hence is not governed by the principles which ruled the cases above mentioned.

This is a case in which a debtor, presumably at the solicitation of his creditor, effected an insurance on his own life for the benefit of his creditor, the latter being designated in the policy as the beneficiary, and agreeing to pay the expense of effecting the insurance and of keeping the policy in force. It was also agreed that the debtor might at any time pay the debt, and reimburse the creditor for outlays in effecting and maintaining the insurance, and thereby entitle himself to an assignment of the policy. It has never been seriously questioned but that a person may insure his own life, and by the terms of the policy appoint another to receive the money, upon the event of the death of the person whose life is insured; or, having taken a policy, valid in its inception, that he may in good faith assign his interest in such policy, as in any other chose in action. *Hutson v. Merrifield*, 51 Ind. 24 (19 Am. R. 722); *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; *Ashley v. Ashley*, 3 Sim. 149; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24; *Clark v. Allen*, 11 R. I. 439 (23 Am. R. 496). See, also, note to *Clark v. Allen*, *supra*, 17 Am. Law Reg. 86; *New York Mut. Life Ins. Co. v. Armstrong*,

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117 U. S. 591; *Archibald v. Mutual Life Ins. Co.*, 38 Wis. 542; *Eckel v. Renner*, 41 Ohio St. 232.

In either case the essential point is that the transaction be *bona fide*, and not merely a cover for obtaining wagering or merely speculative insurance, and a device to evade the law. *Provident, etc., Co. v. Baum*, 29 Ind. 236; *Olmsted v. Keyes*, 85 N. Y. 593; *Campbell v. New England M. L. Ins. Co.*, 98 Mass. 381; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457; *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35 (22 Am. R. 180); *Murphy v. Red*, 35 Alb. Law Jour. 490; *Cunningham v. Smith*, 70 Pa. St. 450.

The cases which hold invalid the taking or assignment of insurance policies turn upon the fact that in each case the transaction was found to be merely colorable, and a scheme to obtain speculative insurance. *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116 (13 Am. R. 313); *Cammack v. Lewis*, *supra*; *Warnock v. Davis*, *supra*.

Where the person whose life is insured is the real contracting party, and continues to pay the premiums, it is of no consequence that the beneficiary, or appointee in the policy, has no insurable interest in the life of the insured. In such a case the policy is valid in any event, and if the beneficiary or assignee be a creditor, and holds the policy as a security merely, he will be a trustee for the excess, as is any other creditor who holds securities for a debt. In case, however, the party insured is only nominally the contracting party, while the beneficiary named in the policy, or the assignee, has in reality procured the insurance, and paid the premiums, then, in order that the transaction may be taken out of the category of wagering contracts, the beneficiary must have had an insurable interest of a pecuniary character, or of that nature, either present or prospective, at the time the policy had its inception. A policy so taken is the property of the beneficiary, who occupies in that event no trust relation to the debtor. *Hine & Nichols Life Ins.* 75.

That a creditor has an insurable interest in the life of his

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debtor has never been controverted. It is universally allowable that a creditor may in good faith take insurance upon the life of his debtor, either by procuring a policy in which he is designated as the beneficiary, or by assignment. We know of no authority to the contrary of this. While this is true, the amount of the insurance obtained must bear some just proportion to the debt, or the extent of the obligation assumed by the beneficiary, and the probable contingencies attending the future maintenance of the policy. The circumstances must be such as not to raise the presumption that the transaction on its face was a mere speculation.

As was said by the learned judge in *Fox v. Penn M. L. Ins. Co.*, 4 Big. L. & A. Ins. Rep. 458: "If a man should owe me \$10, I can not go and insure his life to the extent of \$10,000." *Mowry v. Home Life Ins. Co.*, 9 R. I. 346.

The policy can not, however, be limited to the amount of the debt. If it were otherwise the creditor would inevitably be compelled to lose whatever sums he might be required to pay in effecting the insurance and paying premiums.

The beneficiary takes the chances of all future contingencies, including the continued solvency of the company; or if it be a company in which the fund is to be accumulated by assessments upon the members, that a sufficient number will continue therein to pay the debt and reimburse him for his advances.

No general rule applicable to all cases can be laid down, except that the interest must be of a substantial character, and such as, under all the circumstances, to take from the transaction the suspicion of mere wagering. *Connecticut Mutual Life Ins. Co. v. Luchs*, 108 U. S. 498.

In the case before us the application for membership shows that the person whose life was insured was within a few months of forty-nine years old, and in good health. The certificate of membership required the payment of sixteen dollars into the treasury of the society the first year, ten dollars annually for the ensuing four years, and four dollars annually

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thereafter during the lifetime of the member, besides paying into the treasury, upon the death of each member, his *pro rata* mortality assessment. In consideration of the agreement to comply with these, among other conditions, the society agreed to pay the beneficiary named, absolutely, upon the death of the member, the sum of two thousand dollars. In the language of the court in *Bevin v. Connecticut Mutual Life Ins. Co.*, 23 Conn. 244: "All the books hold this to be a sufficient interest to sustain a policy of insurance. * * * The policy must, we think, be held to be a valued policy." See note to *Currier v. Continental Life Ins. Co.*, 52 Am. Rep. 134. The transaction being thus relieved from any features of a merely speculative character, the policy vested an absolute right in the beneficiary named therein to collect from the society upon the death of the member the full amount stipulated to be paid, and the amount thus collected became the property of the beneficiary, unless the parol agreement to turn the policy over to the debtor upon the conditions already stated affected the creditor with an enforceable trust in favor of the personal representative. We can discover no principle upon which a trust can be maintained in the absence of any offer by the debtor in his lifetime to pay the debt and reimburse the creditor for his advances. The right to the insurance vested absolutely in the beneficiary as soon as the contract of insurance was consummated. "The moment this policy was executed and delivered, it became property, and the title to it vested in some one. It will not be claimed that it vested in the person whose life was insured. It must have vested then in all or in a part of the payees." *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60.

The transaction had none of the characteristics of a mortgage. It was entirely at the option of the debtor whether or not he would reimburse the creditor for the sums expended in procuring the insurance. Whatever the creditor might have done in respect to the collection of his debt, it was be-

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yond his power to compel the insured to reimburse him for his advances in procuring and maintaining the policy. The debtor had not agreed to repay advances voluntarily made. The advances having been made for the creditor's own benefit, he had no remedy against the debtor or his legal representative to recover them. The rule in cases involving analogous principles is that where the owner of property vests the title absolutely in another in pursuance of an agreement which gives the grantor the option to repurchase or not, at his election, the transaction does not create a mortgage. *Voss v. Eller*, 109 Ind. 260; *Hays v. Carr*, 83 Ind. 275.

The right to the policy, and to the benefits to be derived therefrom, was absolute in the beneficiary until both the debt and the advances were paid, even conceding that the oral agreement referred to would have been enforceable in the lifetime of the insured.

The beneficiary in a life policy, who has an insurable interest in the life of the insured, at the inception of the policy, may enforce payment for the full amount, notwithstanding the debtor, on whose life it runs, may have paid the debt. "Any interest sufficient to justify the insurance, and relieve it of the gambling aspect, will render it valid, and such policy will continue valid in the hands of a beneficiary or assignee, regardless of the cessation of interest, provided the facts show entire good faith and a sufficient justification." *Hine & Nichols Life Insurance*, 82; *Olmsted v. Keyes*, *supra*; *Connecticut Mut. Life Ins. Co. v. Schaefer*, *supra*.

Perhaps, owing to the peculiar nature of contracts such as we are considering, if the debtor, in his lifetime, had tendered the amount of the debt and the advances, the claim of the legal representative might be supported. But, in the absence of an offer to comply with his agreement, we can discover no rational ground upon which the court can now compel the appellant to surrender money to which, according to every principle of law, he has a perfect title, and in

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which neither the debtor nor his representatives ever had any interest, legal or equitable.

A distinguishing element in the determination of cases of this character is, whether the one whose life is insured so contracts himself to pay the premiums that an action could be maintained against him by the creditor for that amount. If such a contract is shown, then the policy is to be regarded as a collateral security, and the debtor is entitled to it upon the extinguishment of the principal debt; while, on the other hand, if the creditor pays the premiums, and the debtor is under no obligation to repay them, the right of the creditor is absolute. *Fremer v. Brade*, 2 De Gex & J. 582; *Knox v. Turner*, Law Rep., 5 Ch. App. 515; *Gottlieb v. Cranch*, 4 De G., M. & G. 440; *Godsal v. Webb*, 2 Keen, 100.

As has already been seen, the debtor neither paid nor was he under any obligation to pay the premiums.

Within all the rules, therefore, the appellant became the absolute owner of the policy, without any outstanding equity in the debtor or his representative, until such payment was made or tendered according to the contract.

Judgment reversed, with costs. ✓

Filed June 23, 1887; petition for a rehearing overruled Nov. 30, 1887.

No. 11,974.

CITIZENS STREET RAILWAY COMPANY v. TWINAME.

NEGLIGENCE.—Common Carrier.—Street Railway Company.—Skill and Care Required.—A street railway company is a common carrier of passengers, with duties and responsibilities analogous to those of a railway company, and is required to exercise the highest degree of care and skill in the transportation of passengers, by providing suitable tracks, rolling stock, etc., keeping pace with science, art and modern improvements in their application to such transportation.

111	587
161	86
161	87
161	91
111	587
165	702

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SAME.—Defective Tracks.—A street railway company is guilty of negligence when it attempts to run its cars over a palpably defective place in its track, when by the use of such increased vigilance and care as are practically available the safety of its passengers is not well assured.

SAME.—Implied Invitation to Passengers.—Contributory Negligence.—When a duly equipped car is placed upon a street railway track, under circumstances indicating that it is ready to receive passengers and about to proceed on its way for their transportation, an invitation to all suitable persons to enter and become passengers is implied, and the acceptance of such an invitation can not be held to be contributory negligence on the part of a passenger, although he may have knowledge that portions of the track over which he is to be carried are defective, he having a right to presume that all necessary precautions have been taken to secure his safety.

SAME.—Assumption of Risks.—Pleading.—Answer.—In an action against a common carrier for negligence in its transportation of passengers, where an agreement on the part of the plaintiff that he will assume all risks is relied upon as a defence, it must be specially pleaded.

From the Marion Superior Court.

H. C. Allen and F. Winter, for appellant.

B. Harrison, W. H. H. Miller and J. B. Elam, for appellee.

NIBLACK, J.—This was an action by Louisa B. Twiname against the Citizens Street Railway Company to recover damages for injuries alleged to have been sustained by her while riding on one of the company's cars on the 7th day of May, 1883. The answer was in general denial.

There was evidence tending to show, that at the time the injuries complained of were received the plaintiff resided on Massachusetts avenue, in the northeastern part of the city of Indianapolis; that, on the morning of the day named, she came down on an errand to a wholesale business house on South Meridian street near the union depot; that, after completing her business with the wholesale house, she went across to a point nearly opposite on Illinois street, where she found a Massachusetts avenue street car, belonging to the street railway company, standing on the track, headed in a northern direction, which was the direction in which she

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wished to go on her return to Massachusetts avenue ; that she entered the car in question, with other passengers, and, after depositing her car fare in the box provided for that purpose, took her seat ; that the car soon started northward along Illinois street, where in a short time it came to a place at which employees of the company were digging under and repairing the track ; that, at that point, the car was run off or precipitated from the track, by means of which the plaintiff was thrown heavily against one of the seats and then to the bottom of the car ; that, sick and faint, she was assisted out of the car ; that she was then about to seek other means of conveyance home ; that one of the company's employees thereupon insisted that she had better wait until the car should be replaced upon the track, as it would be in a short time, when she could continue on her journey in the same car ; that she did so wait for a short time, and until the car was replaced upon the track, when she re-entered it and took a seat ; that, after proceeding a short distance, the car again ran off the track, as a result of which she was again thrown heavily down ; that on reaching home the plaintiff was in much pain and ascertained to be severely bruised.

There was also evidence tending to show that the plaintiff either must have known, or could easily have seen, that the track was torn up and being repaired at the places at which the car ran off.

There was likewise some evidence tending to prove, that when the plaintiff was about to re-enter the car after it first ran off the track, one of the company's employees warned her not to do so until after it had passed the place at which it went off the second time, and that she refused to heed the warning, but as to that the evidence was seriously conflicting.

The court trying the cause at special term, on its own motion, gave the jury a series of instructions, the fourth and eighth of which were as follows :

“ 4. A street car company is a common carrier, and, while it is not an insurer of the safety of its passengers, it is bound

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to exercise the highest degree of skill and foresight for the safe carriage of such passengers upon its cars; and this care and foresight must extend not only to the running of its cars, but also to the construction and repairs of its track, and for injuries caused to a passenger, by reason of failure to exercise such skill and foresight, it is liable to such passenger, provided such passenger was not guilty of any negligence directly and materially contributing to produce such injuries."

" 8. Again, it does not necessarily follow that a passenger is guilty of negligence in getting upon a car, even if it be proved that such passenger knew that the track was unsafe. For example, if the car upon which the plaintiff was riding at the time of the accident in controversy was standing upon the track, and she and others were permitted to get on and deposit their fares, this may be considered as sufficient evidence, in the absence of evidence to the contrary, of an invitation by the company to her to take passage, and if she availed herself of such invitation she can not be deemed guilty of negligence in so doing merely from the further fact, if such is the fact, that she knew the track was being replaced or repaired, and was in a dangerous condition; for she had a right to presume, in the absence of knowledge to the contrary, that the defendant had used, or would use, due care to avoid the danger to passengers incident to the dangerous condition of the track—that is, such care as a person of the highest degree of skill and foresight, with knowledge of all the existing facts and circumstances, would probably have used, in view of such dangers, to guard against accidents to passengers by reason thereof. But if the plaintiff knew that there was a dangerous place in the track, and was warned by the employees of the defendant not to get in the car until after it had gotten over such place, but she persisted, in spite of such warning, in getting in and taking the risk, and after so getting in she received the injuries of which she com-

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plains, then she must be deemed guilty of contributory negligence, and can not recover."

A verdict and judgment for the plaintiff followed, and the judgment thus obtained was affirmed at general term.

Questions were reserved, and have been elaborately presented, upon the instructions set out as above.

A railway company is a common carrier of passengers as well as of freight. A street railway company is also a common carrier of passengers, with duties and responsibilities entirely analogous to, and substantially the same as, those of a railway company in the carriage of passengers. Both are railway companies within the usual meaning of that term, and the same general rules and degree of care in the transportation of passengers must be observed by each. *Thompson Carriers of Passengers*, 26, 442; *Madison, etc., R. R. Co. v. Taffe*, 37 Ind. 361; *Hutchinson Carriers*, sections 500, 501, 502, 503, 504.

Carriers of passengers are required to exercise the utmost skill and foresight in the performance of their duty as such carriers. See 1 *Lacey Digest of Railway Decisions*, 412, paragraph 99, and authorities cited; also, *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346, and *Bedford, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551.

This is the equivalent of requiring that the highest degree of care and skill shall be used in the transportation of passengers as the rule is stated by many of the decided cases. See, also, *Lacey Digest*, and the cases there cited.

Railway companies are bound to provide suitable tracks, rolling stock, and all other agencies required by the business which they assume to transact, and in this respect they must keep pace with science, art and modern improvements in their application to the transportation of passengers. *Hutchinson, supra*, sections 524 and 529; *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264 (54 Am. R. 312); *Louisville, etc., R. W. Co. v. Jones*, 108 Ind. 551.

Any neglect of these requirements which results in an injury

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to a passenger, against which prudence and foresight might have guarded, renders a railway company liable. 1 Lacey, *supra*, 412, paragraphs 100, 101, 102, 103 and 110.

There was, consequently, no error in giving the fourth instruction to the jury so far as it related to the requisite degree of skill and foresight. To constitute a person a common carrier he must hold himself out as such. This may be done either by advertising or by engaging in the business of a common carrier, and the general acceptance of employment incident to such business. Thompson Carriers, *supra*; Hutchinson, *supra*, section 48.

Having thus held himself out, he incurs certain obligations of a public or general character which can only be met by a proper discharge of the duties devolving upon him as a common carrier. As a consequence, whenever a quantity of goods, or a passenger, by any of the usual methods, comes into the possession of a common carrier to be transported over his line, he, in the absence of any agreement to the contrary, assumes all the responsibility which the law attaches to the particular class of business which he has thus undertaken to perform. If it be a passenger, he impliedly agrees to exercise the utmost or highest degree of skill and foresight usually employed in his line of business for the safe transportation of such passenger.

When a duly equipped passenger train of cars is placed upon a railway track, under circumstances indicating that it is ready to receive passengers, and that it is about to proceed on its way for the transportation of passengers, an invitation to all suitable persons to enter the cars and to become passengers over its line is thereby implied. This doctrine is in principle well sustained by the authorities. 1 Thompson Neg., 307; *Nave v. Flack*, 90 Ind. 205 (46 Am. R. 205); *Terre Haute, etc., R. R. Co. v. Buck*, *supra*.

Where a person thus enters a railway car for the purpose of becoming a passenger, he has the right, in the absence of any stipulation or warning to the contrary, to presume that

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all the necessary precautions have been taken for his safe transportation, whatever the condition of the track may in fact be. In such a case, the reasonable inference from the implied invitation to so become a passenger is, that all suitable precautions have been taken, and the acceptance of such an invitation can not be held to be contributory negligence. See again Hutchinson, section 516.

It is a matter of common observation that railway tracks are undergoing frequent, and in many cases constant, repairs, and that travel over them is very seldom suspended on account of ordinary repairs; also, that, by an increased vigilance and care, passengers are usually carried safely over the places at which repairs are being made. A railway company is guilty of negligence when it attempts to run its train of cars over a torn up or palpably defective place in its track, when, by the use of such increased vigilance and care as are practicably available, the safety of its passengers is not well assured, and, for the reasons already given, the same rule is applicable to the management of street railway lines of cars. Our conclusion, therefore, is that the eighth instruction, as applicable to certain features of the evidence in this case, stated the law correctly. Construing both instructions together we see no substantial cause for criticism, much less of complaint.

But the point is also made that the court erred in the concluding part of its fourth instruction in limiting what ought to be considered as contributory negligence to such negligence as may have *directly* and *materially* contributed to the infliction of the injuries complained of. This point is based upon the alleged ground that so high a degree of contributory negligence is not required to defeat an action like the one under consideration.

Beach, in his work on Contributory Negligence, at page 7, says: "Contributory negligence, in its legal signification, is
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such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. To constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury."

To make such a want of care a proximate cause of an injury, it must, according to this well considered definition, contribute *directly* and *materially* to the infliction of the injury. To constitute it a proximate cause it must, in the nature of things, have some *direct* and *material* relation to the injury, and such has been our construction as to the degree of contributory negligence necessary to defeat an action like this. *Toledo, etc., R. W. Co. v. Goddard*, 25 Ind. 185; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301 (30 Am. R. 185); *Nave v. Flack*, *supra*.

As has been stated, there was evidence tending to show that, after the street car ran off the first time, an employee of the Street Railway Company warned the plaintiff not to re-enter the car until after it had passed another point of danger in the immediate vicinity. There was further evidence tending to prove that the plaintiff replied that she had paid her fare and would take the risk. It is insisted, therefore, that the verdict was not sustained by sufficient evidence.

In the first place, conceding that the plaintiff replied as stated, her agreement to take the risk was not made until the contract for her safe transportation had already been broken. In the next place, the witness who testified to having warned the plaintiff, as well as to her reply, was flatly contradicted by other witnesses, thus presenting a case of conflict in the evidence to be passed upon by the jury, and which we can not review. In the third place, when an agreement on the part of the plaintiff to take the risk is relied upon as a defence in the class of actions to which this belongs, the agree-

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ment must be specially pleaded. *Louisville, etc., R. R. Co. v. Orr*, 84 Ind. 50; *Pfaffenberger v. Platter*, 98 Ind. 121.

The judgment is affirmed, with costs.

Filed Sept. 27, 1887.

No. 13,853.

RUDICEL v. THE STATE.

111	595
168	168

CRIMINAL LAW.—*Forgery.—Character of Instrument.*—An instrument to which the accused intended to forge the name of “William R. Stephens,” but instead of so writing it wrote the name “Bill Stevens,” if perfect in form, is calculated to deceive, and will support an indictment for forgery.

From the Huntington Circuit Court.

B. F. Ibach, J. G. Ibach, J. C. Branyan, M. L. Spencer and *W. A. Branyan*, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

ELLIOTT, J.—Counsel say that “A single proposition is urged for the reversal of this cause; that is, was the instrument forged such an one as would deceive or was calculated to deceive any one?”

Their contention is, as we understand them, that, as the appellant intended to defraud by forging the name of William R. Stephens, and instead of writing that name wrote the name “Bill Stevens,” no case is made out, because the instrument was not such as would deceive any person. We can not assent to this doctrine. It is true that the forged instrument must on its face appear to be one of some legal efficacy, but it is sufficient if the legal validity be apparent and not actual. It is only where the instrument appears as matter of law to be void that the accused can escape. Mr.

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Bishop thus states the law: "Since men are not legally presumed to know facts, a false instrument which is good on its face may be legally capable of effecting a fraud, though inquiry into extrinsic facts should show it to be invalid even if it were genuine." 2 Bishop Crim. Law, section 541. In this instance the note was perfect in form, and it is only by inquiry into extrinsic facts that it can be ascertained that it will not bind the person whose note the accused represented it to be. If the note had been sued on, and it had been averred that William R. Stephens had executed it under the style of "Bill Stevens," he, as defendant, would have been compelled to defend by way of answer, and an inquiry into extrinsic facts would have been necessary to determine the validity of the note, so that it is obvious that the validity of the instrument could not have been determined from a mere inspection. If the note had been bought by the person to whom it was offered as the note of the man William R. Stephens, he, had he believed the representations of the accused, would have been defrauded, because the validity of the note was not disclosed as matter of law, but depended upon extrinsic facts. It is not the character of the signature that determines, as matter of law, the validity of a promissory note perfect in form and substance, for, if the note is signed, the manner of signing does not necessarily impair its force. It is not necessary that the prosecution should show that the instrument was in due legal form; it is sufficient if it be shown that it so resembles a valid promissory note as renders it likely to deceive a purchaser. *Garmire v. State*, 104 Ind. 444; *Rollins v. State*, 22 Texas App. 548 (58 Am. Rep. 659).

Where the accused intends to forge the name of a person, and attempts to utter the note as that of the person whose name he intended to forge, he is guilty of the crime of forgery, and will not be allowed to escape punishment on the ground of an error or omission in writing the forged signature. *Powers v. State*, 87 Ind. 97.

Rout v. Ninde et al.

In the case of *Lemasters v. State*, 95 Ind. 367, the forged note purported to be signed by one who could not write, and, although a space was left and indicated for a mark, it was held that forgery might be alleged upon such a note, notwithstanding the fact that there was no mark.

In *Myers v. State*, 101 Ind. 379, the instrument was represented to have been executed by Vincent T. West, but it was signed "Dr. West," and a conviction was sustained.

It is always competent to prove that different names may, in fact, identify or relate to the same person. *Johnson v. State*, 46 Ga. 269; *Commonwealth v. Gale*, 11 Gray, 320; *State v. Dresser*, 54 Maine, 569.

It is competent, therefore, to prove that a man often or usually signs instruments by initials, or by any abbreviation he chooses, or by any familiar name others may give him, and it can not be said as matter of law that William R. Stephens did not often or usually sign his name "Bill Stevens," so that it can not be held that such a signature disclosed the invalidity of the note.

Judgment affirmed.

Filed Sept. 30, 1887.

111	597
115	463

111	597
152	180

No. 13,675.

ROUT v. NINDE ET AL.

SUPREME COURT.—Certiorari.—Rules of Trial Court.—The Supreme Court will not take notice of the existence of the rules of a trial court unless they are properly in the record on appeal, and will not require the clerk, by writ of certiorari, to certify such rules, unless embraced in a bill of exceptions or ordered by the court to be so certified.

From the Adams Circuit Court.

C. J. Lutz and *J. W. Headington*, for appellant.

R. S. Peterson and *E. A. Huffman*, for appellees.

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ELLIOTT, J.—The appellees ask a writ of certiorari requiring the clerk of the trial court to certify to this court a copy of a rule of the circuit court governing applications for changes of venue, and allege that such a rule existed, but do not show that it was ordered to be certified to this court or that it was made part of the bill of exceptions.

It is one of the maxims of jurisprudence that “The practice of the court is the law of the court,” and rules of practice adopted by trial courts of general jurisdiction are, so far as those courts are concerned, rules of law. As they are rules of law, although only such in a limited sense, they are, of course, always before the court by which they were framed, and need not be there pleaded, nor need they in any way be formally brought to the notice of that court. *Broom Maxims*, star p. 134.

Of its own rules the court takes notice. They are ever present, permanent in their nature and general in their operation. They are not adopted for particular cases, but for all cases of a given class; nor do they constitute part of the procedure in a special case, but they constitute part of the general law of procedure applicable to a class or classes of cases. But, while this is true, it is also true that an appellate court can not take notice of the rules of the trial court. The rule is thus stated in *Sandon v. Proctor*, 7 B. & C. 800, by HOLROYD, J.: “Anything required to be done by the law of the land must be noticed by a court of error; but a court of error can not notice the practice of another court.”

It is obvious, therefore, that we can not take notice of the existence of rules such as that here sought to be brought before us, unless they are properly in the record.

It may be that, as such a rule is part of the permanent law of the trial court, it need not be incorporated in a bill of exceptions, but may be certified to this court by order of the trial court. But granting that this is so, still the clerk can not certify such a rule unless it is ordered by the court or is incorporated in a bill of exceptions. This is so, be-

Watson v. The State.

cause the clerk can not determine what is the law of the court, nor can he certify to anything not properly in the record. It may, perhaps, be within the power of the trial court to order its rules certified to us; but, until such an order is made, the clerk can not authoritatively certify a rule to us unless it is incorporated in the bill of exceptions. We are not now required to decide whether the trial court may not, upon proper application, direct the rule to be certified to us; for the appellees' motion is fully disposed of when we hold, as we must, that without an order of that kind a writ can not issue to the clerk directing him to certify the rule, except in a case where the bill of exceptions contains the rule.

Certiorari denied.

Filed Sept. 30, 1887.

No. 13,309.

WATSON v. THE STATE.

From the Marion Criminal Court.

J. N. Scott, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

Howk, J.—In this case substantially the same questions are presented for our decision as those which are considered and decided in *Trout v. State*, *ante*, p. 499.

Upon the authority of the case cited, and for the reasons there given, the judgment in this cause is affirmed, with costs.

Filed Sept. 20, 1887.

Burton et al. v. State, ex rel. Baker et al.

111	600
115	330
111	600
147	508
111	600
148	473
111	600
153	256

No. 12,917.

BURTON ET AL. v. STATE, EX REL. BAKER ET AL.

From the Monroe Circuit Court.

W. P. Rogers and *J. E. Henley*, for appellants.

J. H. Loudon, R. W. Miers, J. W. Buskirk and *H. C. Duncan*, for appellees.

Howk, J.—By the record of this cause and the errors assigned thereon by appellants, substantially the same questions are presented for decision as those which were considered and decided by this court, at its present term, in *Strieb v. Cox*, *ante*, p. 299.

Upon the authority of the case cited, and for the reasons there given, the judgment below in the cause now before us is affirmed, with costs.

Filed June 22, 1887.

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See NEGLIGENCE, 4 to 7.

1. *Contract.—Care Required Concerning Goods.*—A stipulation in a bill of lading issued by a transportation company, that goods received for shipment at Boston are "to be forwarded to Louisville depot only," does not relieve the carrier from its duty to properly care for them after their arrival at the latter place.
Merchants Despatch, etc., Co. v. Merriam, 5
2. *Same.—Duty to Provide Place of Storage.*—Although the bill of lading is silent on the subject, it is the duty of a common carrier, which becomes a part of its contract, to provide a place where goods may be safely kept after they have been unloaded from the cars in which shipment is made. *Ib.*
3. *Same.—Warehouseman.—Negligence.—Delivery to Wrong Person.—Conversion.*—After goods are unloaded and stored, the liability of the carrier becomes that of a warehouseman, whether the depot or place of storage belongs to it or to another; and if, through its negligence, the goods are delivered to a wrong person, it is liable to the owner upon its contract for damages as for a conversion. *Ib.*

COMMON SCHOOLS.

See SCHOOLS.

COMMON GAMBLER.

See INTOXICATING LIQUOR, 2.

COMPROMISE.

See CONTRACT, 8; COUNTY, 5.

Contract.—Consideration.—In order that a compromise may constitute a sufficient consideration for the enforcement of an executory contract, there must have been an actual *bona fide* claim, founded upon a colorable right, about which there was room for honest doubt and actual dispute.
United States Mortgage Co. v. Henderson, 24

CONDITION.

See CONTRACT, 7; DEED; INSURANCE, 7 to 10.

CONSIDERATION.

See COMPROMISE; CONTRACT, 5; DEED; JUDGMENT, 4, 11; MARRIED WOMAN, 4; PLEADING, 4; PRINCIPAL AND SURETY, 3; SOLDIER'S BOUNTY, 2.

CONSPIRACY.

See CRIMINAL LAW, 23 to 29; MALICIOUS PROSECUTION; TORT.

CONSTITUTIONAL LAW.

See DRAINAGE, 1; GRAVEL ROAD, 5; TOWN.

Repeal of Old Constitution by Inconsistent Provisions of New.—Statute.—Repeal by Implication.—The adoption of a new Constitution repeals and supersedes all the provisions of the older Constitution, not continued in force by the new instrument; and the same rule applies to amendments of an existing Constitution, which are inconsistent with the original text of the instrument amended; also to statutory enactments which are inconsistent with later constitutional provisions embracing the same subject-matter. *Griebel v. State, ex rel., 369*

CONTEMPT.

See PARTIES.

CONTINUANCE.

Absence of Attorney.—Discretion of Trial Court.—Reversal of Judgment.—The refusal to continue a cause, on account of an attorney employed therein being professionally engaged elsewhere, is not a ground for reversal, unless it clearly appears that injustice has been done, and the discretion vested in the trial court plainly abused.

Evansville, etc., R. R. Co. v. Hawkins, 549

CONTRACT.

See COMMON CARRIER; COMPROMISE; COUNTY COMMISSIONERS; DEED; ESTOPPEL, 2; GUARANTY; INSURANCE; LEASE; LIFE INSURANCE; MASTER AND SERVANT, 6; PLEADING, 4; PRINCIPAL AND AGENT, 1 to 5; PRINCIPAL AND SURETY; REAL ESTATE; SOLDIER'S BOUNTY.

1. *Construction of Railroad.—Estimates of Engineer.—Stipulation that They Shall be Conclusive.—Recourse to Courts.*—A stipulation in a contract between a railroad company and a contractor, that the estimates made by the former's engineers as to the quality, character and value of the work performed by the contractor shall be final and conclusive against the latter, "without further recourse or appeal," can not deprive him of the right to resort to the courts for the recovery of what may be due him, notwithstanding the estimates.

Louisville, etc., R. W. Co. v. Donnegan, 179

2. *Same.—Taking Control of Work from Contractor.*—A provision in the agreement, that, if the contractor fails to employ such a force of workmen as the company's engineer may deem adequate to a completion of the work within the time fixed, the latter may do so and charge the contractor with the amount paid in wages, must be given a reasonable construction, and control of the work can not be taken from the contractor without sufficient cause. *Ib.*

3. *Same.—Competency of Engineers.—Implied Undertaking as to.*—In such case there is an implied undertaking on the part of the railroad company that the engineer to be put in charge shall be competent, honest and reasonably careful, and that he will not make delays, caused by his wrongs, a pretext for taking the work out of the control of the contractor. *Ib.*

4. *Same.—Material Furnished at Direction of Engineer.—Compensation Notwithstanding Contract.*—Where the work which the contractor under-

takes to do is to be performed under the direction of the railroad company's engineer, who is clothed with almost absolute authority as to the manner in which it shall be done, the contractor is entitled to pay for piling of the original length ordered by the engineer and subsequently shortened at his direction, notwithstanding a provision in the contract that the contractor is to be paid for the lineal feet of piling actually used. *Ib.*

5. *Conveyance.—Married Woman.—Release of Inchoate Interest.—Consideration.—Statute of Frauds.*—The complaint in this case alleged that the plaintiff's husband sold a tract of land belonging to him to the defendant, the plaintiff joining in the conveyance; that the consideration for the land and the conveyance was the promise of the defendant to pay her five hundred dollars, it being agreed that he should sell the land as soon as he could procure a purchaser and pay said sum to plaintiff; that he had had frequent opportunities to sell the land for its full value, but had neglected and refused to do so; that he had refused to pay plaintiff the agreed sum; that he denied making the promise, and claimed that he was under no obligation to pay her any amount whatever.

Held, that the contract is supported by a sufficient consideration, is not within the statute of frauds, and that the complaint is good on demurrer. *Worley v. Sipe, 238*

6. *Same.—Estoppel.*—A party can not deny the existence of a contract and at the same time insist upon its terms as a defence. *Ib.*

7. *Condition.—Construction.—Promise to Pay Money Upon Completion of Railroad to Certain Points.*—The instrument sued on provided that the money sought to be recovered should become due and payable when a railroad should be built by a named company, and cars should be run from Kirklin, in Clinton county, to Carmel, in Hamilton county. It was further provided, that if said company should not construct said railroad from the former to the latter place and run a train of cars "to within one-fourth of a mile of Carmel within one year from this date, in Hamilton county, Indiana, and also to Indianapolis, in Marion county, Indiana, then this note shall be void."

Held, that there can be no recovery on the promise, unless the railroad was completed to both Carmel and Indianapolis within one year from the date of the instrument. *Moore v. Campbell, 328*

8. *Insurance.—Compromise of Disputed Liability.—Rescission.—When Necessary Prior to Action on Original Obligation.*—A recovery can not be had upon a contract which has been released and surrendered in pursuance of a subsequent contract, upon which an amount has been paid as a compromise of a disputed liability upon the original obligation, so long as the subsequent contract remains unrescinded and in force, even though the compromise was effected by fraud.

Home Ins. Co. v. Howard, 544

CONTRIBUTION.

See JUDGMENT, 15.

CONVERSION.

See COMMON CARRIER, 3; JUDGMENT, 2; WILL, 1.

CONVEYANCE.

See CONTRACT, 5; DEED; FRAUD; HUSBAND AND WIFE, 2, 3; MORTGAGE, 8.

1. *Trust.—Gift.—Recovery of Possession.—Quieting Title.*—Where the purchasers of land have the legal title conveyed to another, who pays no part of the consideration, the latter, in the absence of facts showing a gift of the property, becomes a trustee for the purchasers, and

after a conveyance of the trust estate at the request of the beneficiaries can not maintain an action to recover possession or quiet title.

Stringer v. Montgomery, 489

2. *Same.—Evidence.—Written Instruments.*—In such case it is proper to show all the transactions between the parties, and the written instruments relating to the acquisition and disposition of the property are admissible in evidence. *Ib.*
3. *Same.—Married Woman.—Suretyship.—Trust Estate.*—The conveyance by a married woman, to secure her husband's debt, of property held by her in trust for him, is not invalidated by the statute prohibiting her from entering into a contract of suretyship, as such statute applies only to property owned by her in her own right. *Ib.*

CORPORATION.

See LIFE INSURANCE, 8; STATE UNIVERSITY.

Sale of Stock.—Implied Warranty.—There is no implied warranty on the part of the vendor of certificates of stock, that the corporation issuing them is a corporation *de jure*. If the corporation is a *de facto* one, that is sufficient to relieve the vendor from any implied warranty as to the existence of the corporation. *Harter v. Ellsroth*, 159

COSTS.

See JUDGMENT, 10.

COUNTY.

See COUNTY COMMISSIONERS; GRAVEL ROAD, 5, 10, 11; SOLDIER'S BOUNTY.

1. *Treasurer.—Agency.—Respondent Superior.*—A county treasurer is not an agent of the county in such a sense that the maxim *respondent superior* can be invoked. His duties are prescribed by law, and in the exercise of his office he is in no way subject to the control of the board of county commissioners. *Vigo Township v. Board, etc.*, 170
2. *Same.—Township Funds.—Defalcation of Treasurer.—Liability of County.*—A county treasurer is not the agent of the county in respect to funds collected by him for townships, and, in the absence of a statute so providing, the county is not liable to the townships for his defalcations. *Ib.*
3. *Same.—Trust.—Township Funds Credited to General Fund of County.*—The board of county commissioners has no control of the funds which the law requires to be collected for and apportioned to the townships, and occupies no relation of trust concerning such funds in the treasurer's hands, unless they have actually been paid into the corporate treasury, *i. e.*, credited to the general fund of the county. *Ib.*
4. *Same.—Auditor.—Warrants for Township Funds.—Create no Obligation Against County.*—In drawing warrants upon the county treasurer for the funds in his hands belonging to the townships, the county auditor does not act as the agent of the county, nor do such warrants create any obligation against it. *Ib.*
5. *Same.—Compromise of Suit Against Defaulting Treasurer.—Rights of Townships.—Action Against County.*—Where a suit has been instituted by the county auditor upon the official bond of a defaulting county treasurer, and a compromise is effected, whereby a certain part of the amount converted is accepted in full satisfaction, a township which suffered a loss to its funds by the defalcation is entitled to its proportion of the sum recovered, but it can not maintain an action therefor against the county, unless it is shown that the share belonging to it has been covered into the county treasury to the credit of the general fund. *Ib.*

COUNTY AUDITOR.

See COUNTY, 4, 5; MORTGAGE, 2; OFFICE AND OFFICER, 6, 7.

COUNTY COMMISSIONERS.

See COUNTY; GRAVEL ROAD.

1. *Authority to Build Jail and Sheriff's Residence.*—The board of commissioners of a county has authority to build a jail and a sheriff's residence in connection therewith. *Board, etc., v. Bunting, 143*
2. *Same.—Contract.—Plans and Specifications.—Right to Change.—Compensation.—Evidence.*—Under a contract between the board of commissioners and an architect, by which the former, acting officially, has the right to change the plans and specifications for the proposed building, evidence of a request for a change, not specifying the character of the alteration, by one member, acting individually, is not admissible in a suit upon the contract for compensation. *Ib.*

COUNTY SURVEYOR.

See DRAINAGE; OFFICE AND OFFICER, 8.

COUNTY TREASURER.

See COUNTY; CRIMINAL LAW, 9 to 15; OFFICE AND OFFICER, 4.

CRIMINAL LAW.

See INTOXICATING LIQUOR; JUDGMENT, 10.

1. *Former Jeopardy.—Plea of Guilty.—Dismissal.—Practice.*—Where a defendant is arraigned before a court of competent jurisdiction to hear and determine the charge, and to adjudge the punishment affixed to the offence, and pleads guilty, which plea has been entered and accepted, and all other steps required by law have been taken, so that nothing further remains to be done except to assess the punishment, he has been put in jeopardy, and can not again be put on trial for the same offence. *Bowwell v. State, 47*
2. *Same.—Assault and Battery.*—B. was charged with assault and battery, by a sufficient affidavit, duly filed. He was arrested on a proper warrant, brought before a justice of the peace having competent jurisdiction to try and determine the charge, and being required to plead entered a plea of guilty, which was entered and accepted by the court with the consent of the State, the prosecuting attorney being present. Afterwards, the injured party being present, the defendant standing on his plea of guilty, and demanding a hearing, the State voluntarily dismissed the prosecution;
Held, that such proceeding was a bar to any further prosecution of B. for the same offence, he having been in jeopardy. *Ib.*
3. *Cruelty to Animals.—Domestic Fowl.—Statute Construed.*—A domestic fowl is an animal within the meaning of the statute on the subject of cruelty to animals. *State v. Bruner, 98*
4. *Same.—Affidavit.—Ownership of Animal.—Immaterial Averment.—Description.—Proof.*—In an affidavit charging cruelty to an animal, an allegation as to the ownership of the animal is unnecessary; but where the ownership is charged, it becomes a matter of description and must be proved as alleged. *Ib.*
5. *Same.—Necessary Averments.—Method of Torture and Effect Produced.*—In such an affidavit, the method of torture or mutilation, as well as the effect produced, ought to be stated. *Ib.*
6. *Same.*—An affidavit which avers substantially that the defendant "did then and there unlawfully and cruelly torture, torment and needlessly mutilate a certain animal, to wit, a goose, the property of some person

or persons to the affiant unknown, by then and there unlawfully turpentining and burning in a cruel and wanton manner the said goose," sufficiently charges cruelty to an animal within the meaning of the statute. *Ib.*

7. *Rape.—Penetration.*—Under the statute, section 1806, R. S. 1881, the slightest penetration, the other elements of the crime being present, is sufficient to constitute rape. *Taylor v. State, 279*
8. *Same.—Circumstantial Evidence.*—Penetration, like any other element of crime, may be established by circumstantial evidence. *Ib.*
9. *Embezzlement.—County Treasurer.—Indictment.—Description of Funds.*—Under the act of 1883 (Acts of 1883, p. 106) it is not necessary to the sufficiency of an indictment charging a county treasurer with embezzlement that it should contain a particular description of the different funds embezzled, i. e., whether county funds, school funds, etc. *Hollingsworth v. State, 289*
10. *Same.—Proceedings Declaring Vacancy.—Admissibility in Evidence.—Defective Summons.*—Upon the trial of a county treasurer, charged with embezzlement, proceedings before the circuit judge, upon petition of his sureties, wherein the office is declared vacant, are admissible in evidence, notwithstanding the summons in that proceeding did not state where the petition would be heard. If such a statement is required under sections 5538 and 5545, R. S. 1881, its omission is a mere irregularity, not available collaterally. *Ib.*
11. *Same.—Affirmative Showing of Error.*—An objection to the admission in evidence of the order of the judge declaring the office of treasurer vacant, on the ground that no record of the proceedings appears to have been made, is not available unless it affirmatively appears that such record was not made. *Ib.*
12. *Same.—Instructions.—Bill of Exceptions.—Supreme Court.*—The mere act of the clerk in copying into the transcript what purport to be instructions given by the court, but which are not made part of the record by a bill of exceptions or otherwise, does not present them in a manner authorizing consideration by the Supreme Court. *Ib.*
13. *Same.—Excluding Documentary Evidence.—Showing of Error.*—The Supreme Court can not determine that there was error in ruling out offered documentary evidence if the instruments excluded are not in the record. *Ib.*
14. *Same.—Embezzlement by County Treasurer.—Demand not Necessary to Establish.*—A demand upon a retiring county treasurer by his successor for the funds remaining in his hands is not necessary in order to establish a conversion and embezzlement of such funds. *Ib.*
15. *Same.—Evidence.—Voluminous Records.—Expert Accountants.*—In a prosecution for embezzlement, or other crime, where the books, records, papers and entries are voluminous, and of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts, expert accountants may be allowed to examine such books, etc., and testify to the result. *Ib.*
16. *Technical Errors.—Briefs.—Sufficiency of.*—A judgment will not be reversed on account of technical errors which did not affect the substantial rights of the accused on the merits. *Ib.*
17. *Embezzlement.—Indictment.—“Employee.”—Meaning of and Averments as to.*—The word “employee” has a well defined meaning, and in an indictment for embezzlement against one employed by another, charging him with having embezzled the funds of his employer, it is sufficient to describe him as an “employee,” without setting out the facts constituting the employment. *Ritter v. State, 324*

18. *Same.—Supreme Court.—Practice.—Case not Reversed on Weight of Evidence.*—In a criminal case the verdict will not be disturbed on appeal, nor the judgment reversed, merely on the weight or sufficiency of the evidence. *Ib.*
19. *Instruction to Jury.—Invasion of Province of Jury.*—An instruction to the jury in a criminal cause, to the effect that, under the evidence adduced, if they find the defendant guilty, it is an aggravated offence, and that they have the right to fix a proper penalty, is an invasion of the province of the jury, and erroneous. *Roberts v. State, 341*
20. *Same.—Presence of Prisoner Throughout Trial.*—In a criminal prosecution, where the offence charged is punishable by death, or by confinement in the State prison or county jail, the defendant must be personally present during the trial, unless he in some way waives the right, and if any substantial part of the trial is had in his absence without his consent, notwithstanding the presence of his counsel, it is such an error as requires a reversal of the judgment on appeal. *Ib.*
21. *Same.—Instructing Jury Part of Trial.—Withdrawal of Erroneous Instruction.*—Instructing the jury is a part of the trial, and if the jury, after retirement, are called back into the court-room, and an erroneous instruction withdrawn or corrected by a statement of the court, in the absence of the defendant, who is charged with a crime of the class above mentioned, it is error. *Ib.*
22. *Bill of Exceptions.—Agreement by Prosecuting Attorney Extending Time of Filing.*—An agreement by the prosecuting attorney extending the time for filing a bill of exceptions beyond the statutory limit of sixty days allowed by the court (section 1847, R. S. 1881), is without authority, and a bill thereafter filed is not properly in the record, and presents no question. *Bartley v. State, 358*
23. *Conspiracy to Defraud.—Indictment.—Naming Parties to be Defrauded.*—It is not necessary to the sufficiency of an indictment charging a conspiracy to cheat and defraud "divers citizens of Randolph county" and the "public generally," by certain false and fraudulent representations, that the names of the persons against whom the conspiracy was directed should be set out. *McKee v. State, 378*
24. *Same.—Character of Pretences.—Question for Jury.*—In such a case, whether the alleged pretences were of such a character as to impose upon citizens of the community, as communities are actually constituted, is a question of fact for the jury to determine. *Ib.*
25. *Same.—Protection of Weak and Credulous.*—The purpose of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves. *Ib.*
26. *Same.—Renewal of Conspiracy.*—After the joint design is once fairly established, every act done in pursuance of the original purpose, whether by one or more of the conspirators, or their agent, is a renewal of the original conspiracy. *Ib.*
27. *Same.—Agent of Conspirators.—Declarations of.—Evidence.*—One employed as agent by conspirators, after their criminal undertaking is on foot, to aid in the prosecution of their designs, may testify to false representations made by him and some of his associates while carrying forward the business of the undertaking, although made in the absence of the person on trial. *Ib.*
28. *Same.—Employment of Agent to Commit Crime.—Liability of Principal.*—One who employs an agent to assist in the execution of a criminal act is as guilty of the acts of the person employed as if he himself had performed them. *Ib.*

29. *Same.—Formal Agreement Not Essential to Formation of Conspiracy.*—It is not essential to the formation of a conspiracy that there should be any formal agreement between the parties to do the acts charged, but it is sufficient if the minds of the parties understandingly meet, so as to bring about an intelligent and deliberate agreement to do the acts although not manifested by any formal words. *Ib.*
30. *Arraignment and Plea.—Reversal of Judgment.*—Where, in a criminal case, the record does not show that the defendant was arraigned or waived arraignment, or that a plea was entered by or for him, a judgment of conviction will be reversed. *Hicks v. State, 402*
31. *Instructions.—Record.—Bill of Exceptions.—Supreme Court.*—Instructions which are copied into the transcript by the clerk, but not brought into the record by a bill of exceptions or by a special order of the court, will not be considered on appeal. *Brown v. State, 441*
32. *Same.—Manslaughter.—Assault and Battery with Intent to Commit.—Verdict.—Failure to Specify whether Voluntary or Involuntary.*—In a prosecution for assault and battery with intent to commit manslaughter, the verdict is not vitiated, or the substantial rights of the defendant prejudiced, by a failure to specify therein whether the intent was to commit voluntary or involuntary manslaughter. *Ib.*
33. *Lottery.—Sale of Share or Chance in.—Information.—Sufficiency of.*—An information charging the sale of a share or chance in a lottery scheme or gift enterprise, substantially in the language of section 2077, R. S. 1881, defining the offence, is good on motions to quash and in arrest of judgment. *Trout v. State, 499; Watson v. State, 599*
34. *Same.—Repugnant Allegations.—Surplusage.—Motions to Quash and in Arrest.*—Contradictory and repugnant allegations in an information, unless containing matter which, if true, constitutes a legal bar to the prosecution, will be regarded as surplusage and afford no ground for quashing the information, where the offence is charged therein with sufficient certainty. *Ib.*
35. *Same.—Weight of Evidence.*—A verdict will not be disturbed on the weight of the evidence. *Ib.*
36. *Aiding in Escape of Prisoner.—Indictment.—Duplicity.*—For an indictment for aiding in the escape of a prisoner, which is held to charge the felony defined in section 2029, R. S. 1881, and not the misdemeanor defined in section 2031, and also held not to be bad for duplicity as charging both offences, see opinion. *Stewart v. State, 554*
37. *Same.—Instructions.—Refusal to Give.—Presumption.*—Where the evidence is not in the record, or where the record does not affirmatively show that it contains all the instructions given by the court of its own motion, the Supreme Court will presume, in aid of the refusal of the trial court to give an instruction asked, either that such instruction was not applicable to the evidence, or that the law embraced therein had been given by the court of its own motion. *Ib.*
38. *Same.—Giving Erroneous Instruction.—When Not Available Error.*—The giving of an erroneous instruction is not available for the reversal of the judgment, where it appears that the substantial rights of the defendant were not prejudiced thereby. *Ib.*
39. *Same.—Arraignment.—Irregularity.*—A mere irregularity or informality in the arraignment of the defendant, which does not prejudice his substantial rights, is not available error. *Ib.*
40. *Misconduct of Prosecuting Attorney.—Opening Statement.—Testimony of Defendant.—Waiver of Error.*—Where a prosecuting attorney in his opening statement to the jury uses the following language: "You should watch the evidence closely. We do not know that the defendant will

go upon the stand. He has not been sworn; I noticed that. If he should go upon the stand you should watch—," he thereby palpably violates the spirit and purpose of the statute governing the testimony of defendants in criminal cases; but where the court sustains an objection to the use of such language, and the same is withdrawn from the jury, the error is not available if the defendant proceeds to the end of the trial without further objection. *Coleman v. State, 563*

41. *Same.—Practice.—Error Waived.*—A defendant in a criminal case, who has knowledge of the misconduct or incompetency of a juror, or other matter, not affecting the jurisdiction of the court, which would vitiate the trial, yet proceeds with the trial to its conclusion, without objection, will not be heard afterwards to object that the proceeding was vitiated thereby. *Ib.*
42. *Same.—Prosecuting Attorney.—Misconduct of.—Practice.—Motion to Set Aside Submission.*—Where the prosecuting attorney, in his opening statement, is guilty of misconduct prejudicial to the substantial rights of the defendant, the latter, in order to avail himself of the error, must move to set aside the submission and discharge the jury. *Ib.*
43. *Same.—Assault with Intent to Commit Rape.—Witness.—Absence of Prosecutrix.—Instruction.*—In a prosecution for assault with intent to commit rape, where the testimony of the prosecutrix is accessible to both parties, it is not error for the court to refuse to instruct the jury that her failure to appear at the trial, and the failure of the State to account for her absence, were circumstances proper to be considered by them as tending to show that no crime had been committed. *Ib.*
44. *Same.—Reasonable Doubt.—Instruction.*—In the trial of a criminal cause, where the jury has been instructed that before they can return a verdict of guilty they must find from the evidence, and be convinced of the defendant's guilt beyond a reasonable doubt, it is not error to refuse an offered instruction "that it is better that ten guilty persons escape than that one innocent suffer." *Ib.*
45. *Forgery.—Character of Instrument.*—An instrument to which the accused intended to forge the name of "William R. Stephens," but instead of so writing it wrote the name "Bill Stevens," if perfect in form, is calculated to deceive, and will support an indictment for forgery. *Rudicel v. State, 595*

CRUELTY TO ANIMALS.

See CRIMINAL LAW, 3 to 6.

CUSTOM.

See STATUTE, 6.

DAMAGES.

See CANAL, 3; COMMON CARRIER, 3; FRAUD; MALICIOUS PROSECUTION.

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; COMPROMISE; CONTRACT, 8; EXECUTION; LIFE INSURANCE, 10 to 13.

DECEDENTS' ESTATES.

See ADVANCEMENT; APPEAL, 10; JUDGMENT, 1 to 3; WILL.

1. *Administrator.—Acceptance of Individual Note of Predecessor.—Judgment.*—Where an administrator accepts from his predecessor (a former administrator) a promissory note, executed by the latter, payable to himself for money due from such predecessor to the estate of the decedent, and obtains judgment on such note in his own right, he can not, as against a third party, who purchases the real estate of the debtor, acquired by him after his discharge in bankruptcy, successfully assert

- that such cause of action was one not barred by the bankrupt's discharge. *Donald v. Kell*, 1
2. *Administrator.—Sale of Real Estate.—Petition.*—An administrator is allowed to sell land for the purpose of making assets only in case of necessity, and in his petition for an order of sale he must state facts clearly showing that such necessity exists. *Renner v. Ross*, 269
3. *Same.—Will.—Widow's Statutory Allowance.—Election by Widow.*—A petition by an administrator for an order to sell the real estate of the decedent to make assets for the payment of the widow's statutory allowance, which shows that there is a will, but does not show whether or not the widow has elected to take under its provisions, is insufficient. *Ib.*

DEED.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CONVEYANCE; REAL ESTATE; TAX SALE, 1, 3.

Consideration.—Condition Subsequent.—Care and Support.—Quieting Title.—Construing Together Contemporaneous Instruments.—A father executed to his son a warranty deed, in which the consideration was stated to be one thousand dollars. Contemporaneously, and as a part of the same transaction, the son executed to the grantor an instrument called a mortgage to secure the performance of agreements and stipulations therein set out for the support and maintenance of the latter during his natural life, which in fact constituted the sole consideration for the deed. It was provided that the son should occupy the land during the grantor's life. He went into possession and so continued for three months, giving his father proper support and treatment. The grantor then, being old and childish, ordered the grantee to leave the farm, which he did, without offering further performance of the contract. The grantor remained in possession, others giving him support, and shortly afterwards demanded a reconveyance on the ground that the grantee had failed to comply with the contract, but never made a demand for maintenance. Suit by him to quiet his title.

Held, construing both instruments together, that the deed was upon a condition subsequent, which, being broken, entitled the grantor to the relief asked.

Held, also, that the abandonment of the land by the grantee was, under the circumstances, such a renunciation of the contract as authorized the grantor to enter and treat the arrangement as at an end.

Held, also, that the grantor's continuance in possession after condition broken was equivalent to a re-entry for the breach.

Richter v. Richter, 456

DEMAND.

See CRIMINAL LAW, 14.

DESCRIPTION.

See MECHANIC'S LIEN; PLEADING, 6.

DISCRETION.

See CONTINUANCE; PLEADING, 8; PRACTICE, 5; WITNESS, 1.

DISMISSAL OF ACTION.

See ATTACHMENT, 1, 4.

DOMESTIC RELATIONS.

See GUARDIAN AND WARD; HUSBAND AND WIFE; MARRIED WOMAN.

DRAINAGE.

See NUISANCE.

1. *Repair of Ditches by County Surveyor.*—Act of April 6th, 1885, *Consti-*

tional.—Section 10 of the act of April 6th, 1885, making it the duty of the county surveyor to keep ditches in repair, giving him power to assess the cost upon the lands adjudged benefited in the original proceedings establishing such ditches, and providing for notice of the assessments and for an appeal to the circuit court by any person aggrieved, is constitutional. *Fries v. Brier, 65*

2. *Same.*—*Limit of Surveyor's Authority.*—The authority of the county surveyor, under the statute in question, is strictly limited to keeping ditches in repair, to the dimensions, as to width and depth, as required in the original specifications. *Ib.*

DURESS.

See MARRIED WOMAN, 9.

EASEMENT.

See CANAL.

EJECTMENT.

See QUIETING TITLE, 1; REAL ESTATE, 1; STATUTE OF LIMITATIONS.

EMBEZZLEMENT.

See CRIMINAL LAW, 9 to 15, 17.

EQUITY.

See MORTGAGE, 1, 5 to 7.

ESCAPE OF PRISONER.

See CRIMINAL LAW, 36.

ESTOPPEL.

See APPEAL, 7; CONTRACT, 6; INSURANCE, 1; INTOXICATING LIQUOR, 3; JUDGMENT, 4 to 7; LIFE INSURANCE, 5, 7; MARRIED WOMAN, 5; NEW TRIAL, 6; OFFICE AND OFFICER, 7, 8; QUIETING TITLE, 1.

1. *Former Adjudication.*—*Pleading.*—*Answer.*—*Parties.*—*Mortgage.*—*Foreclosure.*—*Judgment.*—An answer to a complaint, in an action brought by the widow of the mortgagee to foreclose a mortgage given to secure certain promissory notes, payable to such mortgagee, which alleges that the payee and mortgagee in his lifetime, describing himself as the guardian of certain minor heirs named, instituted a foreclosure suit in the proper court, on the identical notes and mortgage, against the defendants, and that such proceedings were had in that behalf that upon the issues duly joined therein there was a finding and judgment for the defendants, but which does not allege that the merits of the case as to the plaintiff individually were in some way involved in the issues and determined by the prior judgment, is bad on demurrer. *McBurnie v. Seaton, 56*
2. *Contract.*—A party can not deny the existence of a contract and at the same time insist upon its terms as a defence. *Worley v. Sipe, 238*

EVIDENCE.

See ADVANCEMENT, 3; BILL OF EXCEPTIONS; CONVEYANCE, 2; COUNTY COMMISSIONERS, 2; CRIMINAL LAW, 8, 10, 11, 13, 15, 27; HIGHWAY; INSURANCE, 5; JUDGMENT, 16; MALICIOUS PROSECUTION; NEW TRIAL, 1; PRACTICE, 1, 5; PRINCIPAL AND SURETY, 14, 16; REAL ESTATE, 1; RELEASE; WITNESS.

1. *Experts.*—*Railroad Builders.*—*Time of Performing Work.*—*Opinion.*—Persons experienced, as contractors, in railroad building are experts, and may testify that, but for delays caused by the railroad company and its engineers, the work contracted for could have been completed within the time fixed in the contract. *Louisville, etc., R. W. Co. v. Donnegan, 179*

2. *Same.—Action by Railroad Contractor.—Cost of Work.*—In an action by a contractor against a railroad company, wherein it is alleged that the defendant had hindered and delayed the plaintiff in the prosecution of the work, and had wrongfully taken it out of the latter's control, and completed it at a reckless and extravagant cost and charged the plaintiff therewith, evidence as to the reasonable cost of the work is competent. *Ib.*
3. *Declarations of Agent.*—Declarations of a time-keeper, within the line of his employment, are admissible in evidence against his principal. *Pennsylvania Co. v. Nations, 203*
4. *Railroad.—Killing Animal.—Hypothetical Question.*—In an action against a railroad company for killing a mare, it is not error to permit the following question to be answered: "Suppose 'Little Miss' (the mare) was in as good condition, sound in wind and limb, at the time she was killed in October, 1884, if she was killed then, as she was when you knew her last, then I will ask you to state what was her fair market value;" especially so where counsel apprise the court that if they do not maintain the hypothesis upon which the question is put, the evidence shall be struck out. *Cincinnati, etc., R. R. Co. v. Jones, 259*
5. *Same.—Race Horse.—General Reputation.*—In such case, evidence of the general reputation of the mare among horsemen and turfmen, with reference to her being rattle-headed or disposed to break when racing, is not admissible. *Ib.*
6. *Same.—Practice.—Witness.*—Where it does not appear from any statement in the record what a witness would have testified to in answer to an interrogatory, the sustaining of an objection presents no question on appeal. *Ib.*
7. *Impeaching Testimony.—Error to Exclude.*—It is error to exclude competent impeaching testimony, properly and seasonably offered, where no limit to the number of such witnesses has been fixed by the court, although other impeaching testimony has been offered and received. *State, ex rel., v. Thomas, 515*
8. *Same.—Witness.—Practice.*—Where the question is as to the right of a witness to testify at all, and not as to the competency of his testimony, the party offering him is not required to state what he expects to prove by such witness. *Ib.*
9. *Foreclosure of Mortgage.—Payment.—Set-Off.*—Where the issue joined upon a complaint to foreclose a mortgage, executed to secure unpaid purchase-money, is upon pleas of payment and set-off, evidence that the cash payment stipulated in the contract of sale has been made is not competent. *Stewart v. Smith, 526*

EXECUTION.

See JUDGMENT, 12.

Proceedings Supplementary.—Complaint.—Necessary Averments.—Demurrer.—Practice.—A verified complaint in a proceedings supplementary to execution, which fails to state that the judgment debtor is a resident of the county in which such complaint is filed, or that an execution against his property has been issued to the sheriff of the county in which he resides, is bad, and the defect may be reached by a general demurrer. *Pouder v. Tate, 148*

EXECUTORS AND ADMINISTRATORS.

See APPEAL, 10; DECEDENTS' ESTATES; JUDGMENT, 1 to 3; WILL, 1.

EXPERT.

See EVIDENCE, 1.

FALSE IMPRISONMENT.

See SCHOOLS, 8.

FORECLOSURE.

See APPEAL, 7; ESTOPPEL, 1; EVIDENCE, 9; MECHANIC'S LIEN; MORTGAGE; NEW TRIAL, 5.

FORFEITURE.

See INSURANCE, 1 to 3.

FORGERY.

See CRIMINAL LAW, 45.

FORM.

See STATUTE, 1.

FORMER ADJUDICATION.

See ESTOPPEL, 1; JUDGMENT; QUIETING TITLE, 1.

FRAUD.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CONTRACT, 8; JUDGMENT, 11.

Conveyance.—False Representations as to Value of Promissory Notes.—Damages.

—An innocent party who is induced to convey valuable property by a reliance upon false representations of the purchaser that promissory notes, executed by a third person, which are taken in exchange for the property, are good and well secured, when in fact they are worthless, is entitled to damages. *Bish v. Beatty, 403*

FREE GRAVEL ROAD.

See GRAVEL ROAD.

GIFT.

See CONVEYANCE.

GRAVEL ROAD,

See STATUTE, 2, 3.

1. *Petition.—Signers to.—Jurisdiction.—Practice.*—Where the petition for the construction of a gravel road on its face does not disclose the absence of jurisdictional facts, and no objection is made to it before the board of commissioners, an objection that it is not signed by the requisite number of freeholders is not maintainable on appeal. *Robinson v. Rippey, 112*
2. *Same.—Jurisdiction not Ousted by Delay.*—After jurisdiction has been once acquired by the county commissioners, it is not ousted by mere delay in taking action in the case. *Ib.*
3. *Same.—Notice.—Appearance.*—Where a party appears without making an objection to the sufficiency of the notice, he can not make such objection on appeal. *Ib.*
4. *Assessment.—Collateral Attack.*—Assessments for the construction of a free gravel road can not be impeached collaterally, unless the proceedings of the board of commissioners under which they are made are void. *Strieb v. Cox, 299; Burton v. State, ex rel., 600*
5. *County Indebtedness.—Free Gravel Road Bonds.—Constitutional Inhibition.*—Bonds issued by a board of commissioners, under the provisions of section 5097, R. S. 1881, for the purpose of raising money for the construction of a free gravel road, do not constitute or evidence an indebtedness incurred by the county within the inhibition of article 13 of the State Constitution. *Ib.*
6. *Act of 1885 did not Repeal Former Acts.*—The act of April 8, 1885, con-

cerning gravel and macadamized roads, did not repeal the former acts covering that subject, hence, assessments and proceedings under the act of 1877, and the authority thereby conferred upon the board of county commissioners, are not affected by the later statute.

Board, etc., v. Fuller, 410

7. *Same.—Cost to be Borne by Land Benefited.—Legislative Intention.*—It was the intention of the Legislature in the enactment of the gravel road laws to make the land benefited by improvements thereunder bear the whole expense of such improvements. *Ib.*
8. *Same.—Additional Assessment.—Power of County Commissioners to Make.*—The board of commissioners has authority to levy an additional assessment, not exceeding the special benefits conferred upon the land, to pay the cost of the improvement, in case the original assessment proves insufficient, and it may do so of its own motion, without a petition. *Ib.*
9. *Same.—Matter of Additional Amount to be Referred to Viewers.—Notice.*—The board of commissioners can not itself determine the additional amount to be assessed against the land-owners, but notice must be given and the matter referred to the viewers, as in the first instance. *Ib.*
10. *Same.—Agency.—Respondent Superior.*—In directing the construction of free gravel roads and levying assessments the board of commissioners is not the agent of the county, and the maxim *respondent superior* can not apply in any form. *Ib.*
11. *Same.—Cost of Improvement.—Liability of County.*—The fact that a free gravel road when constructed becomes public, does not make the county liable for the cost of the improvement beyond the original estimate. *Ib.*

GUARANTY.

1. *Notice of Acceptance by Guarantee.—When Necessary.*—Where there is a mere proposal on the part of those sought to be charged as guarantors to guaranty the faithful performance of some obligation which another may enter into, provided credit shall be extended, or a duty undertaken, the contract of guaranty is incomplete until the original obligation is entered into and the proposition of guaranty accepted, and due notice thereof given to the guarantors.
Furst & Bradley M'f'g Co. v. Black, 308
2. *Same.—When Notice of Acceptance Unnecessary.*—Where a guaranty is for the fulfilment of a contract already made, or for one executed contemporaneously with the contract of guaranty, or for the payment of an existing debt, or where the contract of guaranty is upon a consideration distinct from the credit extended to the principal debtor, and which moves directly between the guarantor and guarantee, notice of acceptance is unnecessary. *Ib.*
3. *Same.—Direct Guaranty.—When Guarantors Entitled to no Notice of Default.*—An engagement on the part of guarantors or sureties themselves to pay or perform absolutely, and at all events, the contract of their principal, is in its nature original, direct and absolute, and the promisors are entitled to no notice of the default of their principal. *Ib.*
4. *Same.—Indirect and Collateral Guaranty.—When Guarantors Entitled to Notice of Principal's Default.*—Where guarantors agree that their principal will perform his contract, they not engaging to perform it in case he makes default, the guaranty is indirect and collateral, and the guarantors are entitled to notice of the default of the principal. *Ib.*
5. *Same.—Failure to Give Notice.—Defence.*—The failure of the guarantee to give notice to the guarantor of the default of the principal debtor,

where such notice is required, and the damages resulting from such failure, are matters of defence, and should be specially pleaded. *Ib.*

GUARDIAN AND WARD.

See JUDGMENT, 9, 11, 13; STATUTE OF LIMITATIONS.

Guardian's Sale.—Failure to Give Additional Bond.—Collateral Attack.—The failure of a guardian to give the additional bond required by the statute upon a sale of his ward's real estate, is not available in a collateral attack to defeat the sale, notwithstanding the statute of limitations. *Davidson v. Bates, 391*

HIGHWAY.

See GRAVEL ROAD; NEGLIGENCE, 2, 3; NUISANCE; RAILROAD.

1. *Proceeding to Vacate.—Evidence.*—In a proceeding to vacate a public highway it is not error to exclude testimony to the effect that certain individuals had offered to construct a foot-bridge over a stream which crossed such highway. *Whetton v. Clayton, 360*
2. *Same.—Best Evidence.*—In such proceeding an order of vacation theretofore made by the board of commissioners can not be proved by parol, in the absence of any reason shown for the attempted resort to secondary evidence. *Ib.*

HUSBAND AND WIFE.

See MARRIED WOMAN; MORTGAGE, 6, 8; PRINCIPAL AND SURETY, 5.

1. *Tenants by Entireties.—Mortgage by to Secure Debt of Husband or Others.*—A mortgage executed by a husband and wife upon real estate owned by them as tenants by entireties, to secure the payment of a debt due from the husband or others, is invalid, both as to the husband and wife. *Crooks v. Kennett, 347*
2. *Same.—Coverture a Personal Defence.—Not Available for Third Parties.—Mortgage.—Grantor and Grantee.*—Coverture is a personal defence, of which third parties can not avail themselves for their own benefit, and where a husband and wife mortgage real estate, and afterwards sell it, the grantee can not avail himself of the defence against the mortgage that it was executed to secure the payment of a debt due from the husband alone, and that at the time of its execution the husband and wife owned the real estate as tenants by entireties. *Ib.*
3. *Same.—Cancellation of Mortgage.*—Where a husband and wife, owning real estate as tenants by entireties, sell and convey the same, their grantee can not maintain an action against one holding a prior mortgage thereon executed by such husband and wife to secure a debt of the husband, to have his title quieted and such mortgage cancelled on account of such facts, notwithstanding an averment in his complaint that such mortgagee recognizes and admits that the mortgage is void, and refuses either to cancel or to bring an action for its foreclosure. *Ib.*

INDICTMENT.

See CRIMINAL LAW.

INFANT.

See STATUTE OF LIMITATIONS.

INFORMATION.

See CRIMINAL LAW.

INJUNCTION.

See TAX SALE, 3.

INSANITY.

See JUDGMENT, 11 to 14.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 12, 19, 21, 31, 37, 38, 43, 44; INSURANCE, 8, 9; PRACTICE, 4; SCHOOLS, 9; SUPREME COURT, 1, 8.

INSURANCE.

See CONTRACT, 8; JURY; LIFE INSURANCE.

1. *Stipulation Against Other Insurance without Written Consent Endorsed on Policy.—Forfeiture.—Waiver.—Estoppel.—Pleading.*—In an action to recover on a policy of fire insurance, stipulating that “if the assured shall have or shall hereafter make any other insurance on the property insured, or any part thereof, without the consent of the company hereon written, this policy shall be void,” a complaint, showing that after the policy was executed an agreement was made that other insurance might be taken, and that a written stipulation to that effect would be inserted in the policy, and also alleging that other valid insurance was taken without any notice to the company or request to insert the stipulation agreed upon, does not show a waiver of the condition against further insurance or estop the company to insist that there has been a breach of such condition, and is bad on demurrer.
Havens v. Home Ins. Co. 90
2. *Same.—Separate Items or Classes of Property Insured.—When Contract and Risk Indivisible.—Policy Void as to Part Void as to All.*—Where the property covered by a policy of insurance, although consisting of separate items, appears to be so situate as to constitute substantially one risk—as a building and the furniture in it—then, even though separate amounts of insurance be apportioned to each separate item or class of property, if the consideration for the contract and the risk are both indivisible, the contract must be treated as entire; and any breach of a stipulation which renders the policy void as to part affects in the same manner all the other items.
Ib.
3. *Same.—Construction of Policy.—Measure of Rights and Obligations.*—While courts incline to such a liberal construction of insurance contracts in favor of the insured as, if possible, to avoid a forfeiture, yet, where parties have, without fraud, mistake or surprise, deliberately entered into a contract, that alone must be looked to as furnishing the measure of their respective rights and obligations.
Ib.
4. *Policy.—Alteration.—Burden of Proof.*—In an action on a policy of insurance on the face of which no alteration is apparent, the burden is upon the insurer, if an alteration after delivery is claimed, to establish the fact of such change.
Insurance Co. of North America v. Brim, 281
5. *Same.—Premium.—Rate.—Evidence.*—Where the premium paid by the assured upon a policy purporting to be for five years, is more than the minimum rate for three years as established by the insurance companies doing business in the locality where the risk is taken, and less than such rate for five years, the exclusion of evidence showing the minimum rate so established, as bearing upon the question of an alteration in the policy of from three years to five years, is at most a harmless ruling.
Ib.
6. *Same.—Contract.—Deceased Party to.—When Agent not Competent Witness.*—In an action upon a policy of insurance by one who succeeded to the property therein described as heir and to the policy by assignment, the testimony of an agent of the insurance company, who is called as a witness for the latter concerning matters occurring in the lifetime of the assured, is not competent under section 500, R. S. 1881.
Ib.
7. *Same.—Notice of Loss.—Reasonable Diligence.—Invalid Condition.*—A condition in a policy issued by a foreign insurance company doing busi-

ness in this State, requiring immediate notice of any claim thereunder, is not valid under section 3770, R. S. 1881, and such condition will be held to mean that the assured shall use reasonable diligence in giving notice of loss. *Ib.*

8. *Same.—Reasonable Notice.—Instruction to Jury.*—What constitutes reasonable notice must depend upon the circumstances of each case; but it is not for the jury to determine what facts in law constitute reasonable notice, this being the function of the court, to be discharged by instructing the jury as to the legal value of the facts in evidence. *Ib.*
9. *Same.—Incomplete Instruction.*—An instruction that a condition requiring immediate notice was void, that if the plaintiff, taking into consideration all the circumstances, gave notice within a reasonable time the condition was complied with, and that it was a question of fact for the jury to determine, under all the circumstances, what was a reasonable time, is not erroneous, although incomplete. *Ib.*
10. *Same.—Time of Bringing Suit.—Void Condition.*—A condition in a policy of insurance that suit must be brought within one year from the date of loss, is in contravention of section 3770, R. S. 1881, which provides that any condition not to sue for a period of less than three years shall be void, and a suit brought after a year is not barred. *Ib.*

INTEREST.

See STATE UNIVERSITY.

INTERROGATORIES TO JURY.

Withdrawal.—Practice.—To constitute available error in permitting a party to withdraw from the jury, over the objection of the adverse party, interrogatories propounded by him, it must be shown that such interrogatories were pertinent and material. *Groscop v. Rainier, 361*

INTOXICATING LIQUOR.

1. *Remonstrance.—Immorality.*—Immorality on the part of the applicant, which may be made the basis of a remonstrance against the granting of a license to retail intoxicating liquors, under the act of March 17th, 1875, is not limited to such immorality as is specified in that act. *Groscop v. Rainier, 361*
2. *Same.—Common Gambler.*—Frequenting places where gambling is permitted is, under section 2085, R. S. 1881, a public offence, and is such an immorality as unfits an applicant to be intrusted with the sale of intoxicating liquors. *Ib.*
3. *Same.—Qualification of Remonstrants.—Waiver of Objections to.—Estoppel.*—Where the board of commissioners, without objection on the part of the applicant, entertains and acts upon a remonstrance, and hears and determines the questions thereby presented, and on appeal the circuit court does likewise, also without objection, all objections to the remonstrants are waived by the applicant, and the latter is estopped to deny that they are legal voters of the township. *Ib.*

JEOPARDY.

See CRIMINAL LAW, 1, 2.

JUDGMENT.

See APPEAL, 1, 2, 5 to 9; ATTACHMENT; ATTORNEY AND CLIENT, 3; DECEDENTS' ESTATES, 1; ESTOPPEL, 1; GRAVEL ROAD, 4; NEW TRIAL, 5; PARTIES; PRINCIPAL AND SURETY, 8 to 17; QUIETING TITLE, 1; SHERIFF'S SALE.

1. *Enforcement of.—Bankruptcy.—Character of Debt.*—Where the enforcement of a judgment is sought to be defeated by a discharge in bank-

ruptcy, it is proper to look behind it to the character of the debt upon which it is founded; and if it is ascertained that the debt belongs to a class upon which the discharge does not operate, the judgment will be enforced. *Donald v. Kell, 1*

2. *Same.—Revival of Judgment.—Rights of Third Parties.—Record.—Administrator.—Wrongful Conversion.*—Where, in such case, a judgment is sought to be revived and enforced against real estate acquired by the debtor after his discharge in bankruptcy, and by him sold to a third party, and the record shows that the action in which the judgment was rendered was upon a promissory note, executed by the debtor in his individual capacity, the judgment will not be revived or enforced against such third party, although, in fact, the note on which the judgment was rendered had been given by the debtor to his successor, as administrator, for moneys belonging to the estate, which had been wrongfully converted by the former to his own use. *Ib.*
3. *Same.—Pleading.—Answer.—Unnecessary Averments.*—Where an answer to a complaint to revive and enforce a judgment against one who has been discharged in bankruptcy shows that the judgment is founded on a promissory note, it is not necessary that there should be an additional averment that the debt was not incurred in a fiduciary capacity, as the note on its face implies a contract between the parties as individuals. *Ib.*
4. *Estoppel.—Promissory Note.—Failure of Consideration.—Cancellation.*—Where, in a suit upon a part of a series of promissory notes given for the purchase-price of land, the others not being due, the answer sets up facts showing a failure of the consideration of the notes sued on only, but praying that the whole series be declared satisfied, and a judgment is rendered for the defendant, that judgment is not a bar to a proceeding upon the remaining notes, and a complaint in equity, based upon such judgment, to obtain the cancellation and surrender thereof, will not lie. *Kilander v. Hoover, 10*
5. *Same.—Action Upon Series of Notes.—When Judgment Bars Subsequent Action.*—It is only where the judgment involves the whole of a series of notes, and settles the entire defence thereto, that it operates as an estoppel as to the whole; otherwise the judgment is a finality only as to so much of the claims and defences as were actually litigated in the first suit. *Ib.*
6. *Conclusiveness of.—Parties.*—Judgments are presumptively only conclusive against parties in the character in which they sue or are sued. *McBurnie v. Seaton, 56*
7. *Same.—Estoppel.—Former Adjudication.*—The estoppel of a judgment is only presumptively conclusive where it appears that the suit and the issues were of such a character that the judgment could not have been rendered without deciding the particular matter again brought in question. *Ib.*
8. *Conclusiveness.—Collateral Attack.—Jurisdiction.*—A judgment rendered by a court having jurisdiction of the subject-matter and of the persons of the parties will stand as against a collateral attack. *Walker v. Hill, 223*
9. *Same.—Guardian and Ward.—Proceedings to Sell Land.—Mere Errors and Irregularities not Available Collaterally.*—However irregular and erroneous the proceedings and orders of a court having probate jurisdiction may be, in relation to the sale and conveyance of the real estate of minor heirs, upon the petition of their guardians, yet if such proceedings and orders are not void, they are conclusive when questioned collaterally. *Ib.*
10. *Costs.—Criminal Law.—Jurisdiction.—Dismissal of Appeal.*—A judgment

for costs rendered against the defendant in a criminal prosecution, upon dismissal by a court having no criminal jurisdiction, is void.

Ferrier v. Deulshman, 330

11. *By Default Against Insane Person.—Suit to Set Aside.—Mistake.—Guardian and Ward.—Promissory Note.—Innocent Holder.—Fraud.—Consideration.*—Where a judgment by default is taken against a person of unsound mind, after due service of process, by a good-faith holder of a commercial note, which had been obtained by the original payee from the defendant by fraud and without consideration, it may be set aside under section 396, R. S. 1881, at the suit of the guardian or administrator, and the latter let in to defend, by showing that the defendant was of unsound mind when he executed the note, and that it was without consideration, although the plaintiff practiced no fraud in obtaining the judgment and had no knowledge of the defendant's insanity, which had not been judicially declared.
Dickerson v. Davis, 433
12. *Same.—Collateral Proceeding in Aid of Execution.—Will not Defeat Right to Relief from Judgment.*—The right to obtain relief from a judgment under section 396 can not be defeated by the plaintiff instituting proceedings in aid of an execution, to enforce the judgment from which the defendant, by appropriate proceedings then pending, is seeking to be relieved.
Ib.
13. *Same.—Sale.—Redemption by Guardian.*—The fact that the guardian of an insane person, against whom a judgment has been wrongfully obtained, to save his ward's property, redeems from a sale thereof under proceedings to enforce the judgment instituted during the pendency of a complaint to set it aside, is not a bar to relief under section 396.
Ib.
14. *Same.—Wrongful Judgment.—Enforcement.—Effect of Setting Aside.*—One who proceeds with the enforcement of a judgment wrongfully obtained, with knowledge that proceedings have been instituted by or on behalf of the defendant to be relieved therefrom, assumes the risk that, if the judgment be set aside, he will be compelled to restore to his adversary whatever has been so coerced from him.
Ib.
15. *Suretyship.—Contribution.—Collateral Attack.*—Where a valid judgment has been rendered against several defendants, in which the question of suretyship between them has been determined, a suit for contribution afterwards brought by one of such defendants is a collateral attack on the judgment, and will fail.
Knopf v. Morel, 570
16. *Same.—Evidence.—Reversible Error.*—Parol evidence attacking a judgment which the record thereof on its face shows to be void, though incompetent, does not prejudice nor impair the rights of the party claiming under such judgment, and the admission of such evidence is not reversible error.
Ib.

JUDICIAL KNOWLEDGE.

See MECHANIC'S LIEN, 4; SUPREME COURT, 9.

JURISDICTION.

See APPEAL, 1; GRAVEL ROAD, 1, 2; JUDGMENT, 8 to 11.

JURY.

See INTERROGATORIES TO JURY; MORTGAGE, 1.

1. *Juror.—Examination of, on Voir Dire.—Misconduct.—Duty of Juror.—Practice.*—In the examination of a juror upon his *voir dire*, if the general question asked fairly arouses his attention and directs it to the information desired, it is enough without specific questions covering minute phases of the subject, and it is the duty of the juror to make full

and truthful answers, neither falsely stating any fact nor concealing any material matter within the general scope of the question, and any violation of this rule is such misconduct as is prejudicial to the party.

Pearcy v. Michigan Mut. Life Ins. Co., 59

2. *Same.—New Trial.—Insurance.*—In an action against a life insurance company to recover upon a policy of insurance, where a juror, in response to a question asked in the examination of the jury as to whether he held a policy of insurance issued by the defendant, answered in the negative, the truth being that he had taken out such a policy on his life for the benefit of his wife, the plaintiff having no knowledge of the fact, he is guilty by reason of such concealment of such misconduct as entitles the plaintiff to a new trial, notwithstanding his affidavit and those of his fellow-jurors, that in arriving at their verdict they were guided solely by the law and evidence. *Ib.*

JUSTICE OF THE PEACE.

See APPEAL, 1.

LANDLORD AND TENANT.

See LEASE.

LAW OF CASE.

See SUPREME COURT, 6.

LEASE.

1. *Implied Covenant for Quiet Enjoyment.—Landlord and Tenant.*—A covenant for quiet enjoyment is implied in every mutual contract for leasing land, by whatever form of words the agreement is made.
Hoagland v. New York, etc., R. W. Co., 443
2. *Same.—State Canal. — Lease of Use of Surplus Water.—Quiet Enjoyment.*—Under a lease by the State of the use of so much of the surplus water, not required for navigation, of the Wabash and Erie Canal as would be sufficient to propel certain machinery in the lessee's mills, the implied covenant for quiet enjoyment was such that, so long as the canal was used for purposes of navigation, and while there was, during that period, a surplus of water, the lessor agreed to do no acts which would interrupt or deprive the lessee of its enjoyment. *Ib.*
3. *Same.—Abandonment of Canal.—Appropriation to Other Uses.—Obstruction of Channel.*—The contract in such case did not impose upon the lessor or its grantees any obligation to keep the canal in repair, or to maintain it in such a condition that a surplus of water would be available, or to supply the lessee with any water whatever, but the latter took the lease subject to all the vicissitudes which might attend a public work of that character, and to the right of the lessor or its grantees to abandon the canal for purposes of navigation and to appropriate it to other uses, including the construction of a railroad on the line occupied by it, thereby filling up the channel. *Ib.*

LEGISLATURE.

See TOWN.

LICENSE.

See INTOXICATING LIQUOR; PHYSICIAN.

LIEN.

See ATTORNEY AND CLIENT, 3; JUDGMENT; MECHANIC'S LIEN; MORTGAGE; SHERIFF'S SALE; TAXES; TAX SALE.

LIFE INSURANCE.

See INSURANCE; JURY.

1. *Mutual Benefit Associations.—Members Take Notice of By-Laws.—Certificate.—Contract.*—Mutual benefit associations are in the nature of mutual insurance companies, and persons who become members thereof are bound to take notice of the by-laws, the latter becoming a part of the contract the same as if written in the certificate. *Holland v. Taylor*, 121
2. *Same.—Change of Beneficiary.—Provision of By-Laws.*—The beneficiary in a certificate issued by a mutual benefit association, providing for a change of beneficiary, does not, during the life of the assured, have an indefeasible right in the contract or fund to be paid thereunder; but such beneficiary has an interest which can only be defeated by a change effected in the manner provided by the by-laws. *Ib.*
3. *Same.—Attempted Change of Beneficiary by Will.—Guardian.—Executors.—Control of Fund.*—Where the by-laws of a mutual benefit association, not a domestic corporation, provide for the payment of a sum of money to the dependents of a member, and fix definitely the manner of changing the beneficiary, upon the death of the assured, without making a change in the manner specified, the beneficiary named in the certificate becomes the absolute owner of the fund, unaffected by a will attempting to make a different disposition thereof, and, if the beneficiary is a minor under guardianship, the guardian is entitled to the possession and control of the money as against the assured's executors. *Ib.*
4. *When Premiums can not be Recovered.*—Where a risk once attaches under a valid policy, premiums paid upon it during its continuance can not be recovered back as for money had and received. *Continental Life Ins. Co. v. Houser*, 266
5. *Policy Incontestable Except for Fraud.—Non-Payment of Premium.—Taking Order.—When Insurer Estopped to Deny Payment.*—Where both the policy of insurance, which provides that it is incontestable except for fraud, and the application state, the one by express words and the other by clear implication, that the consideration has been paid, the insurer is estopped to deny payment as against the beneficiary, and the policy is enforceable by the latter, notwithstanding part of the premium was not in fact paid, but instead orders were given therefor by the assured on his employer, who, at his request, refused to pay them, and although the orders stipulated that if they were not paid the assured's rights were thereby forfeited. *Kline v. Nat'l Benefit Ass'n*, 462
6. *Same.—Interest of Beneficiary in Policy.—Not Affected by Subsequent Acts of Assured.*—The beneficiary in an ordinary contract of insurance takes an immediate interest in the policy, and his rights can not be impaired by any act of the assured performed subsequent to its execution. *Ib.*
7. *Age of Assured.—Requirements of By-Laws.—Disregard of.—Estoppel.*—A life insurance company, organized under the laws of this State, which issues a policy to one under the age required by its by-laws merely, with knowledge of the assured's true age, or which, after obtaining such knowledge, still retains the consideration and makes no offer to cancel the contract, is estopped to set up the matter of age as a defence to an action on the policy. *Gray v. Nat'l Benefit Ass'n*, 531
8. *Same.—By-Laws.—Violation of by Insurer.—Rights of Third Persons.—By-laws enacted by the directors, for their own government in the management of the business of the corporation, can not be extended to affect the validity of acts done in disregard thereof, especially where the rights of third persons are concerned.* *Ib.*

9. *Same.—Pleading.—Setting Out By-Law.*—Where, in an action on a life insurance policy, the insurer bases its defence upon its rules or by-laws, they must be set out in the answer or the latter will be bad. *Ib.*
10. *Insurable Interest.*—No one can have the benefit of an insurance effected by himself upon the life of another, unless he has an insurable interest in the life insured. *Amick v. Butler, 578*
11. *Same.—Creditor's Insurable Interest in Life of Debtor.—Amount of Insurance Permissible.*—A creditor has an insurable interest in the life of his debtor, and may in good faith take insurance upon his life. The amount of the insurance obtained must bear some just proportion to the debt, or the extent of the obligation assumed, and the contingencies attending the maintenance of the policy, though it can not be limited to the amount of the debt. *Ib.*
12. *Same.—Liability of Creditor for Surplus After Payment of Debt.*—Where money has been collected upon a policy of insurance which had its inception in a scheme of mere speculation on the life of the insured, or where insurance is taken out by a debtor as security for the benefit of his creditor, the expense of procuring and continuing the policy being borne by the former, the amount collected, less the debt secured or the sums advanced in obtaining and keeping the policy in force, may be recovered by the personal representatives of the person insured. *Ib.*
13. *Same.—When Creditor Entitled to Full Amount of Policy.*—Where a creditor receives from his debtor a policy of insurance on the life of the latter, paying all the expenses attending the issuance thereof, and all subsequent assessments and charges thereon, and being named therein as beneficiary, and upon the death of the debtor receives the amount stipulated therein, which is largely in excess of the indebtedness and the expenses of insurance paid by him, he is not liable to the representatives of the debtor for such excess, although it had been agreed between the parties that if the debtor should pay the indebtedness and the expense of insurance the policy should be turned over to him. *Ib.*

LIMITATION OF ACTIONS.

See GUARDIAN AND WARD; SOLDIER'S BOUNTY; STATUTE OF LIMITATIONS; TRUST AND TRUSTEE.

LOTTERY.

See CRIMINAL LAW, 33.

MALICIOUS PROSECUTION.

1. *Complaint.—Averment of Conspiracy.—Evidence.*—A complaint in an action against two or more for malicious prosecution, which charges that the defendants wrongfully, maliciously, and without probable cause, did the several things therein charged, to the plaintiff's injury and damage, is sufficient, and authorizes the admission of evidence to show that the defendants were acting in concert in bringing about the alleged injurious result, without an allegation that they confederated and conspired together. *Jenner v. Carson, 522*
2. *Same.—Gist of Action.—Damage.—Conspiracy.*—In such case the damage is the gist of the action, and not the conspiracy. *Ib.*

MANSLAUGHTER.

See CRIMINAL LAW, 32.

MARRIED WOMAN.

See CONTRACT, 5; CONVEYANCE, 3; HUSBAND AND WIFE; MORTGAGE, 4, 6, 8; PRINCIPAL AND SURETY, 5; SHERIFF'S SALE, 4.

1. *Surety for Husband.—Mortgage.*—A mortgage executed in 1875 by a

married woman upon her separate property to secure her husband's debt, was valid, under the law then in force. *Post v. Losey, 74*

2. *Same.—Extension of Time of Payment of Debt.—Release of Surety.*—A wife, who is surety for her husband, will be released from liability the same as any other surety, by an extension of the time of payment of the debt without her consent, and the lien of a mortgage executed by her to secure it will be discharged. *Ib.*
3. *Same.*—It is essential to the discharge of a surety by an extension of time of payment that the payee or promisee should have knowledge of the suretyship. *Ib.*
4. *Same.—Mortgagee Bound to Inquire as to Consideration of Mortgage.*—A person who accepts a mortgage upon the land of a married woman, knowing her to be married, and that the land is her separate property, is bound to inquire as to the consideration, and unless misled by her conduct or representations, he will be held to have acquired knowledge of the facts which prudent inquiry would have disclosed. *Ib.*
5. *Estoppel.*—A married woman, whose representations were relied upon by one who contracted with her in good faith, is estopped to deny the character of her contract. *Rogers v. Union Cent. L. Ins. Co., 343*
6. *Separate Real Estate.—Mortgage Executed Upon to Secure Debt of Another.*—A mortgage executed by a married woman upon her separate real estate to secure the debt of her husband or others is invalid, and can not be enforced. *Crooks v. Kennett, 347*
7. *Act of March 11, 1875.—Inchoate Interest.—Sheriff's Sale.—Prior Mortgage.*—A married woman, who, under the act of March 11, 1875, has had her interest in her husband's real estate, which has been sold on execution, set off to her, occupies a relation analogous to that of surety as to prior mortgages on the whole tract, in which she has joined, and the two-thirds of the land taken by the purchaser at the sheriff's sale is charged with the payment of all such prior encumbrances, provided it is of sufficient value. *Bunch v. Grave, 351*
8. *Mortgage.—Surety.—Statute of 1879.*—Under the statute of 1879 (Acts of 1879, p. 160), a married woman might mortgage her separate property, acquired by purchase, to secure her husband's debt. *Gardner v. Case, 494*
9. *Same.—Duress by Husband.—Knowledge of Mortgagee.*—It is no defence to a suit to foreclose a mortgage against a married woman that the latter executed the mortgage under duress by her husband, unless the mortgagee participated in or had knowledge of the duress. *Ib.*

MASTER AND SERVANT.

See NEGLIGENCE, 1 to 3.

1. *Duty of the Master to Provide Safe Working Places and Machinery.—Negligence.*—It is the duty of the master to use ordinary care and diligence to provide safe working places and safe machinery and appliances for his employees, the neglect of which is an actionable wrong, and he can not absolve himself from liability by delegating such duty to an agent. *Krueger v. Louisville, etc., R. W. Co., 51*
2. *Same.—Fellow-Servant.—Vice-Principal.*—The negligence of a fellow-servant, or co-employee acting as such, will not authorize a recovery, although he may be a superior officer, an agent or a foreman; but if the superior agent is charged with the performance of the master's duty, to that extent his acts and negligence are those of the master. *Ib.*
3. *Same.—Railroad.—Master Mechanic.—Fireman.—Defective Locomotive.*—By order of the division master mechanic of a railroad company, a

tender belonging to one engine was attached to another of different construction, its deck being three to four inches higher than that of the engine. The use of the locomotive as thus constituted was rendered dangerous, by reason of lost motion and the liability of the tender to become detached, and the engineer so notified the master mechanic. While the fireman was engaged in shovelling coal into the fire-box, the engine and tender parted and the fireman was killed.

Held, that the company is liable.

Ib.

4. *Duty of Employer to Provide Safe Machinery.*—It is the duty of the employer to provide the employee with a safe working place and with safe machinery and appliances, and in discharging this duty he is required to exercise ordinary care and skill.

Pennsylvania Co. v. Whitcomb, 212

5. *Same.—Delegation of Duty.—Responsibility of Master.*—The duty to provide employees with safe machinery and appliances can not be so delegated by the master as to relieve him from responsibility. The agent to whom it is entrusted, whatever his rank may be, acts as the master in discharging it.

Ib.

6. *Same.—Rules Governing Employees.—Contract of Service.*—An employer may adopt reasonable rules for the government of his employees, and when brought to the knowledge of the latter, who thereafter continue in the master's service, the rules and an implied undertaking to obey them enter into the contract of service.

Ib.

7. *Same.—Railroad.—Rule that Brakemen Shall Use Coupling-Sticks.—Violation of Requirement.—Liability of Company.*—Where a rule of a railroad company requires that cars shall be coupled by the use of coupling-sticks, and this rule is brought to the knowledge of one employed as brakeman, and assented to by him, it constitutes a part of his contract of service, and for an injury received by him in endeavoring to make a coupling by hand, the company is not liable, unless it be shown that the act could not have been safely performed even by the use of the appliance provided, or that obedience to the rule was not practicable under the circumstances of the particular case.

Ib.

MECHANIC'S LIEN.

1. *Notice of Intention to Hold.—Description of Real Estate.*—The notice of an intention to hold a mechanic's lien may include more land than ought to be sold to discharge the lien, and where, in such notice, the intention is declared to hold a lien on several lots, the numbers of which are given, and "the dwelling-house erected thereon," it is sufficiently definite in that regard.

White v. Stanton, 540

2. *Same.—Description in Notice Aided by Averments of Complaint.*—Where the description of the real estate, in a notice of an intention to hold a mechanic's lien, is so defective as to be insufficient of itself to identify any particular tract of land, but, with the aid of proper averments, it can be rendered definite and certain by the introduction of extrinsic evidence, it will be held sufficient for the purpose intended, and a true description may be supplied at the hearing.

Ib.

3. *Same.—Invalid Notice.*—Where the description in such a notice is so uncertain as to afford no clue to a more definite and correct description, no lien is acquired.

Ib.

4. *Same.—Defective Notice Cured by Averments.—Judicial Knowledge.*—Where a notice of intention to hold a mechanic's lien failed to disclose the county and State in which the real estate upon which the lien was claimed was situate, but the complaint for the foreclosure of the lien averred that the land was situate in the county where the action was pending, that the parties all resided in that county when the notice was filed, and that the notice was recorded in the recorder's office of

the same county, these averments, taken in connection with the judicial knowledge of the court that a section of land, corresponding generally with the one described in the notice, lies within that county, are sufficient to supply the defect. *Ib.*

MILITARY SERVICE.

See SOLDIER'S BOUNTY.

MISCONDUCT OF JURY.

See JURY.

MORTGAGE.

See APPEAL, 7; DEED; ESTOPPEL, 1; EVIDENCE, 9; HUSBAND AND WIFE; MARRIED WOMAN; NEW TRIAL, 5; PRINCIPAL AND AGENT, 1 to 4; PRINCIPAL AND SURETY, 1 to 5; SHERIFF'S SALE, 4.

1. *Foreclosure.—Equitable Cognizance.—Not Triable by Jury*—A suit for the foreclosure of a mortgage is of equitable cognizance, and the issues therein are not triable by jury. *Rogers v. Union Cent. L. Ins. Co.*, 343

2. *School Fund Mortgage.—Action to Set Aside.—County Auditor Not Proper Party*.—In an action to set aside and cancel a mortgage executed to the State, to secure a loan from the school fund, the county auditor is not a proper defendant, and a judgment against such officer in such action will not bind the State, it not being a party.

Semble, that the State can not be made a party to such an action.

Crooks v. Kennett, 347

3. *Validity.—Lex Situs*.—The validity of a mortgage of real estate is to be determined by the law of the place where the property is situated.

Swank v. Hufnagle, 453

4. *Same.—Married Woman.—Surety*.—A mortgage executed in Ohio by a married woman, as surety for another, upon land owned by her in this State, is void under the statute of 1881. *Ib.*

5. *Cancellation.—Equitable Defences.—Maxim "He Who Seeks Equity Must do Equity."*—*Application of*.—A plaintiff who shows himself otherwise entitled to the aid of a court of equity will not, under the maxim that he who seeks equity must do equity, be denied relief, unless the defendant brings forward some corresponding equity, growing out of the subject-matter then in suit, which would, at some time subsequent to the transaction, in some form of proceeding, entitle him to a remedy against the other party, in respect to the subject-matter involved.

Otis v. Gregory, 504

6. *Same.—Married Woman.—Mortgage Without Husband Joining.—Lex Situs.—Vendor's Lien.—Pleading.—Practice*.—A mortgage executed in Michigan by a married woman, without her husband joining, upon her separate land in this State, is void, and, of itself, creates no equity which the courts can recognize; but if the debt intended to be secured thereby is purchase-money, the mortgagee may, by reason of his vendor's lien, in a proceeding by the mortgagor to cancel the mortgage, obtain affirmative relief by cross-complaint, or by setting up the facts by way of answer may, unless his equity is acknowledged, defeat the plaintiff's right to relief. *Ib.*

7. *Same.—Vendor's Lien.—Equitable Subrogation*.—Where a party who holds a valid mortgage upon land releases it, in order that the owner may sell the property and invest the entire proceeds in another tract, he to take a mortgage upon the latter for the amount of his debt, he in effect pays a part of the purchase-money, and, if the mortgage taken is void, will be subrogated to that extent to the rights of the vendor. *Ib.*

8. *Husband and Wife.—Tenants by Entireties.—Suretyship of Wife.—Convey-*

ances to Evade Statute Prohibiting.—S. and wife owned land as tenants by entireties and the former was indebted. To evade the statute (section 5119, R. S. 1881) prohibiting a married woman from encumbering her property as surety, the land was conveyed to a trustee, who reconveyed it to the husband alone, after which it was mortgaged by the husband and wife to secure the former's antecedent debt, and then, through another trustee, reconveyed to the husband and wife as previously held. The mortgagee knew of the purpose of the conveyances.

Held, that under the statute mentioned the mortgage is void.

McCormick, etc., Co. v. Scovell, 551

MUNICIPAL CORPORATION.

See COUNTY; TOWN.

NATIONAL BANKS.

See TAXES.

NEGLIGENCE.

See COMMON CARRIER; MASTER AND SERVANT.

1. *When Employer not Liable.—Contractor.—Master and Servant.—Nuisance.*—Where work which does not necessarily create a nuisance, but is in itself harmless and lawful when carefully conducted, is let by an employer, who merely prescribes the end, to another who undertakes to accomplish that end by means which he is to make use of at his discretion, the latter is, in respect to such means, the master, and if a third person is injured by the negligent use thereof, the employer is not answerable. *Wabash, etc., R. W. Co. v. Farver, 195*
2. *Same.—Operating Portable Steam-Engine Near Highway.—Not Necessarily a Nuisance.*—It is not necessarily a nuisance to operate a portable steam-engine, in a careful manner, in close proximity to a public highway. *Ib.*
3. *Same.—Railroad.—Frightened Horse.—Negligence of Independent Contractor.*—A railroad company is not liable for an injury to a traveller on a highway, through the fright of his horse, caused by the negligence of the owner of a portable steam-engine in operating it, near the highway, under a contract with the company to pump water out of the way of an excavation which is being constructed by the latter, where he has exclusive control of the engine and of the manner of using it. *Ib.*
4. *Common Carrier.—Street Railway Company.—Skill and Care Required.*—A street railway company is a common carrier of passengers, with duties and responsibilities analogous to those of a railway company; and is required to exercise the highest degree of care and skill in the transportation of passengers, by providing suitable tracks, rolling stock, etc., keeping pace with science, art and modern improvements in their application to such transportation. *Citizens Street R. W. Co. v. Twiname, 587*
5. *Same.—Defective Tracks.*—A street railway company is guilty of negligence when it attempts to run its cars over a palpably defective place in its track, when by the use of such increased vigilance and care as are practicably available the safety of its passengers is not well assured. *Ib.*
6. *Same.—Implied Invitation to Passengers.—Contributory Negligence.*—When a duly equipped car is placed upon a street railway track, under circumstances indicating that it is ready to receive passengers and about to proceed on its way for their transportation, an invitation to all suitable persons to enter and become passengers is implied, and the

acceptance of such an invitation can not be held to be contributory negligence on the part of a passenger, although he may have knowledge that portions of the track over which he is to be carried are defective, he having a right to presume that all necessary precautions have been taken to secure his safety. *Ib.*

7. *Same.—Assumption of Risks.—Pleading.—Answer.*—In an action against a common carrier for negligence in its transportation of passengers, where an agreement on the part of the plaintiff that he will assume all risks is relied upon as a defence it must be specially pleaded. *Ib.*

NEW TRIAL.

See APPEAL, 5 to 7; JURY; SPECIAL FINDING, 1.

1. *Newly Discovered Evidence.—Cumulative.—Impeaching.*—A new trial will not be granted on the ground of newly discovered evidence where the latter is merely cumulative, or tends to impeach evidence previously given, nor where a sufficient excuse is not shown for failing to produce the evidence at the first trial. *Pennsylvania Co. v. Nations*, 203
2. *As of Right.—Motion to Vacate Order Granting.—Practice.*—Where a party is in court, by his attorneys, when an order is made granting the opposite party a new trial as of right, and does not object thereto, he can not afterwards move to vacate the order upon the ground that it was made without his knowledge or consent. *Harvey v. Fink*, 249
3. *Same.—When Motion to Vacate Must be Made.*—A motion to vacate and set aside an order granting a new trial as of right must be made at the earliest practicable moment to be available. *Ib.*
4. *Same.—Motion for New Trial After Term.*—Where a verdict is returned on Thursday of the last week of a term of court, a motion for a new trial made on the fourth day of the next term comes too late, under section 561, R. S. 1881, and can not be entertained. *Ib.*
5. *As of Right.—Title to Real Estate not Involved in Foreclosure Proceedings.—Cancellation of Mortgage.—Judgment.—Quieting Title.*—Where, in a foreclosure proceeding, judgment is rendered for the defendant on a cross-complaint which prays the cancellation of the mortgage, and that his title be quieted in respect thereto, the case is not one which involves the title to real estate in such sense that a new trial as a matter of right should be allowed. *Sterne v. Vert*, 408
6. *Surprise.—Waiver.*—A party who sits by, and without asking a postponement takes the chances of a trial, can not, as a general rule, obtain a new trial on the ground of surprise. *Stewart v. Smith*, 526

NOTICE.

See ATTORNEY AND CLIENT, 3; GRAVEL ROAD, 3, 9; GUARANTY; INSURANCE, 7 to 9; LIFE INSURANCE, 1; MARRIED WOMAN, 3, 9; MECHANIC'S LIEN; PARTIES; SUPREME COURT, 9; TRUST AND TRUSTEE.

Summons.—When not Necessary on Cross-Complaint.—It is not necessary to issue a summons on a cross-complaint as against the defendants to the original complaint, where the latter discloses the character of the claim of the cross-complainants, and fairly informs the defendants that such claim will be adjudicated, as it is their duty to take notice without further process of all the proceedings in the cause.

Bevier v. Kahn, 200

NUISANCE.

See NEGLIGENCE, 1 to 3.

Public Highway.—Destruction of Culvert.—Restoration by Land-Owner.—Surface Water.—Collecting into Channel and Discharging Upon Land of Neighbor.—Where the natural course of surface water is, and has been for a long period of time, through a culvert in a public highway and thence

upon the lands of A., the latter has no right to fill up the culvert, thereby causing the highway to become impassable at times of high water, and, by the construction of a ditch, collect the water into a channel and discharge it in a body upon the lands of B., to his injury. Such acts would be the creation of a nuisance which B. would be entitled to abate by restoring the culvert, doing no wanton or unnecessary injury. *Reed v. Cheney*, 387

OFFICE AND OFFICER.

See COUNTY; DRAINAGE; CRIMINAL LAW, 9 to 15; MORTGAGE, 2

1. *Bureau of Vital and Sanitary Statistics.—Clerk.—Appointment of.—Secretary of State.—State Board of Health.*—The secretary of state has no authority to designate or appoint any one for the performance of clerical duties in the Bureau of Vital and Sanitary Statistics, except upon the requisition of the secretary of the State Board of Health, approved by the president thereof, and addressed to him. *Curr v. State, ex rel.*, 101
2. *Same.—Removal of Clerk.*—A person legally appointed to perform clerical duties in the Bureau of Vital and Sanitary Statistics holds his office or employment at the pleasure of the State Board of Health, and the secretary of state has no authority to remove such clerk. *Ib.*
3. *New Bond.—Power of Circuit Judge to Require.—Declaring Vacancy.*—The act of 1852, conferring certain powers upon the judge of the court of common pleas relative to requiring new bonds from public officers, declaring vacancies, etc., since such court has been abolished, is applicable to the circuit court. Section 5538, *et seq.*, R. S. 1881. *Hollingsworth v. State*, 287
4. *Same.—County Treasurer.—Sureties.—Release from Bond.—Failure to Give New Bond.—Vacancy.*—Where the sureties in the bond of a county treasurer petition the judge of the circuit court to be released therefrom, such judge may, after proper notice to the treasurer, and a failure on his part to furnish an additional bond, as required by the statute, declare the office vacant. *Ib.*
5. *Quo Warranto.—Information in Nature of, Proper Proceeding for Obtaining Possession of Office.*—An information in the nature of a *quo warranto* is the appropriate remedy for obtaining possession of an office to which a person, duly qualified, has been legally elected. It is also the proper remedy for the removal of the incumbent of an office, who has usurped and illegally continues to hold it, and both remedies may be sought by the same information. *Griebel v. State, ex rel.*, 369
6. *Same.—County Auditor, Term of.—Breaking of Regular Succession.*—Where there has been an unbroken succession of terms from the adoption of the existing State Constitution to the present time, and no general acquiescence in a different day or time, the commencement of the term of a county auditor dates back to, and is governed by, the time at which the term of the auditor who was in office when the Constitution took effect expired. Where, however, the regular succession of terms has been broken by vacancies or other incidental causes, the term of a newly elected auditor begins when the regular or provisional term of his predecessor expires. *Ib.*
7. *Same.—Estoppel.*—It is only when his successor has not been chosen and qualified that a county auditor can continue in office beyond his term, and whenever such officer has, in pursuance of an election to the office, served the full term of four years, and his successor has been duly elected and qualified, he is estopped from denying that his term of office has expired. *Ib.*
8. *County Surveyor.—Term of Office.—Estoppel.*—P. was elected county surveyor at the general election in November, 1884, and took possession of the office on the 21st of the same month. At the November election,

1886, R. was elected to the same office, and on the 22d of that month demanded of P. the office, with the property belonging thereto, which the latter refused to surrender. In a *quo warranto* proceeding against P., *Held*, that having filled the office for the full term prescribed by the Constitution, he is, as against his regularly elected and qualified successor, estopped from denying that his term of office has expired.

Pursel v. State, ex rel., 519

PARENT AND CHILD.

See DEED; REAL ESTATE, 1.

PARTIES.

See ESTOPPEL, 1; JUDGMENT, 6; MORTGAGE, 2; PLEADING, 2; PRACTICE, 2; WILL, 1.

1. *Examination of.—Notice.—Refusal to Attend.—Contempt.—Striking Out Pleadings.*—Where the defendant to an action is notified by the plaintiff to appear before a justice of the peace to be examined as a party, under section 509, R. S. 1881, touching matters alleged in the complaint, but no summons is issued by the officer, his failure to attend in response to the plaintiff's notice does not constitute a contempt for which, under section 513, his pleadings in the cause may be stricken out. *Bish v. Beatty, 408*
2. *Same.—Judgment as Upon Default.—Showing Necessary to Authorize.*—In such case, to authorize the striking out of the defendant's pleadings and the rendering of judgment for the plaintiff as upon a default, it should also appear that the plaintiff, or some one in his behalf, attended at the time and place mentioned in the notice, and that he desired and was ready to examine the defendant concerning a matter stated in the pleadings. *Ib.*

PARTNERSHIP.

1. *Adjustment of Partnership Accounts.—When One Partner May Maintain Action.*—As a general rule, no action can be maintained by one partner against the other respecting particular items of account pertaining to the partnership business until the accounts of the partnership are finally adjusted, or until the affairs of the firm are so far settled as that nothing remains except to ascertain the final state of the account between the partners. *Thompson v. Lowe, 272*
2. *Same.—Sale of Partner's Interest.—Promissory Note —Set-Off.*—Where one partner transfers his interest in the assets, including the books and accounts of the partnership, to a continuing member of the firm, or to another, and receives in payment for such interest the note of the purchaser, the maker of the note can not set off an account apparently due the firm from the member whose interest was transferred. *Ib.*
3. *Same.*—A sale by a partner of his interest in the assets of a firm does not, in the absence of a special agreement to that effect, imply that the purchaser becomes entitled to collect from the seller what may appear to be due from him on the firm books. *Ib.*
4. *Same.*—The effect of such a sale is to transfer to the purchaser whatever interest the seller has in the assets of the partnership after the payment of all the partnership liabilities, and, in the absence of anything to show to the contrary, it will be presumed that the account of the retiring member was adjusted in ascertaining the value of his interest, and that the value was increased or diminished in proportion as he was found the debtor or creditor of the firm. *Ib.*
5. *Same.—Promissory Note Executed by Firm to Member.*—A note governed by the law merchant, payable by a firm to one of its own members, may be enforced against the firm, if endorsed to an innocent holder before maturity, regardless of the state of the account of the member

to whom it was made payable. But such note in the hands of one who stands in the place of the original payee can not be made the basis of an action at law against the firm, or the remaining partners, it being nothing more than an acknowledgment that the partner named therein had paid into the firm either in property or money the amount specified in the note. *Ib.*

PAYMENT.

See EVIDENCE, 9; PRINCIPAL AND SURETY, 6, 7; SHERIFF'S SALE, 3, 4; TAXES.

Giving Negotiable Note for Precedent Debt.—The giving of a negotiable promissory note, governed by the law merchant, for a precedent debt, will operate as a payment and discharge of such debt, unless it be shown that the parties did not intend that the transaction should have that effect. *Nixon v. Beard, 137*

PENALTIES.

See APPEAL, 11.

PHYSICIAN

1. *License.—Compensation.*—One who undertakes to practice the profession of medicine, without the license required by statute, can not recover compensation for his services. *Orr v. Meek, 40*
2. *Same.—License Required for Each County in Which Physician Practices.*—A physician, who has obtained a license in one county, can not regularly engage in practice in another county without taking out another license. *Ib.*

PLEADING.

See APPEAL, 1; ATTACHMENT, 3; CRIMINAL LAW; DECEDENTS' ESTATES, 2, 3; ESTOPPEL; EXECUTION; GRAVEL ROAD, 1; JUDGMENT, 3; LIFE INSURANCE, 9; MALICIOUS PROSECUTION; MECHANIC'S LIEN; MORTGAGE, 6; NEGLIGENCE, 7; PRACTICE; QUIETING TITLE; REAL ESTATE, 2; SUPREME COURT, 7; TORT.

1. *Practice.—Answer in Abatement.—Demurrer.—Motion to Strike Out.*—Where an answer in abatement is pleaded with an answer in bar, it should be struck out on motion; but neither the fact that it does not precede the answer in bar, nor that it is not verified, renders it bad on a demurrer for want of facts. *State, ex rel., v. Ruhlman, 17*
2. *Same.—Answer in Bar.—Abatement.—Party in Interest.*—An answer which states facts showing that the plaintiff had no interest in the subject-matter of the action at the time of its commencement, and that some other person named was at the time the real party in interest in such suit, is an answer not in abatement, but in absolute bar, of the pending action. *Ib.*
3. *Complaint.—Defect in Form.*—If a complaint state a cause of action, reciting the facts so as to enable a person of common understanding to know what was intended, the judgment will not be reversed on account of defects in the form of pleading. *United States Mortgage Co. v. Henderson, 24*
4. *Consideration of Contract.—Averment of in Complaint.—Plea of Want of.*—Where the consideration of a contract sued on is properly and fully averred in the complaint, a general denial puts the plaintiff to the proof thereof, and it is not error to sustain a demurrer to a paragraph of answer specifically pleading a want of consideration. *Nixon v. Beard, 137*
5. *Complaint.—Demurrer.*—A complaint which shows that the plaintiff is entitled to some relief will repel a demurrer. *Rogers v. Union Cent. L. Ins. Co., 343*
6. *Matters of Description.—Amendment During Trial.—Practice.*—Under sec-

tion 396, R. S. 1881, the trial court may permit a party to correct a pleading as to a matter of description, even after the evidence in chief has been heard. *Reed v. Cheney, 387*

7. *Foreign Statute.*—Where a pleading is founded on a foreign statute the statute must be set out. *Swank v. Hufnagle, 453*
8. *Additional Answers.*—*Refusal to Allow Filing of.*—*Discretion of Trial Court.*—For facts held not sufficient to show an abuse of discretion by the trial court in refusing to allow an additional paragraph of answer to be filed, see opinion. *Gardner v. Cuse, 494*
9. *Complaint.*—*Surplusage.*—Statements of facts in a complaint, which are in themselves material and relevant to the cause of action, can not be regarded as surplusage, although they overthrow the pleading. *Knopf v. Morel, 570*
10. *Same.*—*Repugnant Allegations.*—Where a complaint contains material and relevant facts which constitute a defence to the action, it is bad on demurrer. *Ib.*

PRACTICE.

See APPEAL; ATTACHMENT, 1; BILL OF EXCEPTIONS; CONTINUANCE; CRIMINAL LAW; EVIDENCE, 4, 6 to 8; EXECUTION; GRAVEL ROAD, 1, 3; INTERROGATORIES TO JURY; INTOXICATING LIQUOR, 3; JURY; MORTGAGE, 6; NEW TRIAL; PARTIES; PLEADING; SPECIAL FINDING; SUPREME COURT; WITNESS.

1. *Evidence.*—*Examination of Witness.*—*Objection to Question.*—*Statement as to Answer Expected.*—To constitute available error in ruling out a question propounded to a witness, the interrogating party must announce to the court what he expects to elicit in answer to the question. A general statement that he expects to follow up the question by showing a certain fact, but not announcing that he expects to make the proof by the witness interrogated, is not a compliance with the rule. *Harter v. Eltzroth, 159*
2. *Parties.*—*Supreme Court.*—*Waiver.*—Where one is made a party defendant to an action, who is neither a necessary nor a proper party thereto, the plaintiff can not be heard to object to his right to assail the complaint or petition by assignment of error in the Supreme Court on appeal. *Renner v. Ross, 269*
3. *Appeal.*—*Reversible Error.*—*Overruling Demurrer to Bad Answer.*—The overruling of a demurrer to a bad answer is a reversible error, even though there be other good answers under which the same evidence is admissible. *Thompson v. Lowe, 272*
4. *Instructions.*—*Motion for New Trial.*—*Record.*—Instructions can not be made part of the record by copying them into the motion for a new trial. *Whetton v. Clayton, 360*
5. *Order of Introducing Evidence.*—*Discretion of Trial Court.*—*Supreme Court.*—It is within the discretion of the trial court to admit or exclude in reply evidence that should have been given in chief, and unless there is an abuse of such discretionary power the Supreme Court will not disturb its decision. *Stewart v. Smith, 526*

PRESUMPTION.

See CANAL, 3; CRIMINAL LAW, 37; PRINCIPAL AND SURETY, 14.

PRINCIPAL AND AGENT.

See ATTORNEY AND CLIENT; COUNTY; CRIMINAL LAW, 27, 28; EVIDENCE, 3; GRAVEL ROAD, 10; INSURANCE, 6.

1. *Mortgage.*—*Contract.*—*Subrogation.*—Where a contract of agency provided that the agent was to loan money for the principal upon mortgage security, and that the former should become personally liable

to the latter for all instalments of interest on such money loaned which were not paid within ten days after they became due, such agent, upon the payment of any such instalment of interest under the contract, would be entitled to a remedy against the borrower for the amount so paid, and to participate in the mortgage security to the extent of such payment. *United States Mortgage Co. v. Henderson*, 24

2. *Same.—Foreclosure.—Instalments of Interest.*—Where a loan company, mortgagee, avails itself of a provision in the mortgage that upon a default in the payment of an instalment of interest, the entire debt should become due, and forecloses the mortgage, taking judgment for the whole amount, principal and interest, it can not afterwards enforce a contract with its agent who made the loan, which provided that the latter should be liable to the principal for all instalments of interest on moneys loaned by him as such agent, which were unpaid ten days after they became due. *Ib.*
3. *Same.*—In such case the decree of foreclosure merged the entire contract with the mortgagor, as well in respect to instalments of interest matured as in respect to those not matured, in the judgment and decree, and the agent would not, after such foreclosure, be liable under his contract for any of such instalments. *Ib.*
4. *Same.—Loan Agent.—Attorney.—Liability of Principal for Additional Services Rendered by Agent.*—In a contract between principal and agent, that the latter should make loans of money on bonds and mortgages and collect money to become payable on such loans, a provision that the former should not be liable for any charges, disbursements or commissions to the agent for his services in such agency, does not relieve the principal from liability to the agent for services rendered by him at the former's request, in foreclosing mortgages and collecting moneys by legal proceedings, looking after repairs to and caring for property bought in by the principal upon foreclosure of its mortgages, for renting and collecting rents of such property, and looking after the payment of taxes, and keeping up insurance thereon, and other like services. *Ib.*
5. *Real Estate Broker.—Commission.—Contract.*—Where an agency to sell land is limited to nine months, but it is stipulated in the contract that if a customer is introduced through the agency of the broker, and a sale is afterwards consummated with such customer, the owner shall pay a commission, whether the time of the agreement shall have expired or not, the broker may recover the commission if, during his agency, he introduces a customer to whom the land is afterwards sold, whether the sale is ultimately consummated through his instrumentality or otherwise. *Williams v. Leslie*, 70
6. *Trustee.—Style of Bank Account.*—One who is put in possession of property by joint owners, with instructions to sell it upon the best available terms, at his discretion, is an agent, and not a trustee, and his character is not changed by styling himself "trustee," at the suggestion of one of his principals, a banking company, in making deposits with the latter of the proceeds of sales, to distinguish the account from another kept by him as agent. *Rowe v. Rand*, 206
7. *Same.—Joint Principals.—Severance of Interests.—Revocation of Agency.—Banks.—Mutual Release of Claims.*—Where two banks, as principals, appoint an agent to take charge of a matter in which they are jointly interested, who deposits the joint funds in one of the banks, and a severance of the joint interest afterwards occurs, and in a compromise of differences each releases all claims against the other, the agency is thereby revoked, and a claim against the bank holding the deposit by the other principal for a share therein is discharged. *Ib.*

8. *Same.—Right of Agent to Maintain Action.*—The right of an agent to bring an action in his own name in certain cases is subordinate to the rights of the principal, who may bring suit himself, and thus suspend or extinguish the right of the agent, unless in particular cases where the latter has a lien or some other vested right. *Ib.*

PRINCIPAL AND SURETY.

See APPEAL, 11; ATTACHMENT, 2 to 5; CONVEYANCE, 3; GUARANTY; HUSBAND AND WIFE; JUDGMENT, 15; MARRIED WOMAN; MORTGAGE, 4, 8; OFFICE AND OFFICER, 4.

1. *Mortgage.—Bankruptcy.—Discharge of Principal.*—The lien of a mortgage given by a surety to secure a debt of the principal, is not released by the latter's discharge in bankruptcy. *Post v. Losey, 74*
2. *Same.—Discharge of Bankrupt as to Surety.—Proof of Claim.*—A debtor is relieved from liability to his surety by his discharge in bankruptcy, whether the surety proved the debt against his estate or not. *Ib.*
3. *Same.—Moral Obligation of Bankrupt to Pay Debt.—Consideration for New Promise.*—After his discharge in bankruptcy a debtor is released from legal liability to pay a prior debt, but not from the moral obligation, and the latter will constitute a sufficient consideration for a promise to pay such debt. *Ib.*
4. *Same.—Agreement to Extend Time of Payment.—Endorsement on Note.—Alteration of Contract.*—Where, after his discharge in bankruptcy, the principal debtor and the creditor agree to an extension, for a definite period, of the time of payment of the debt, and to a reduction in the rate of interest, in consideration of which the former agrees to pay the debt at the time stipulated, and the agreement is endorsed on the back of the note originally given, the face of the note and the endorsement are to be construed together, and together they constitute the contract between the parties. *Huff v. Cole, 45 Ind. 300, and Bucklen v. Huff, 53 Ind. 474, distinguished. Ib.*
5. *Same.—Husband and Wife.—Mortgage.—Alteration of Contract.—Release of Surety.*—Where a married woman, in 1875, as surety, joined her husband in the execution of a promissory note, and executed a mortgage upon her separate property to secure it, and the husband was subsequently discharged in bankruptcy, after which, the creditor having knowledge of all the facts, an agreement to extend, for a definite period, the time of payment of the note and to reduce the rate of interest, in consideration of which the husband stipulates to pay the debt, is entered into between the creditor and the husband, without the wife's consent, and endorsed upon the back of the note, there is such an alteration of the contract as releases the wife's property from liability. *Ib.*
6. *Promissory Note.—Payment.—Rights of Surety.*—A surety in a promissory note has the right to require payment of the note to be enforced when it becomes due; or he may, without compulsion, pay and take it up and immediately institute such proceedings as are necessary for his reimbursement. *Nixon v. Beard, 137*
7. *Same.—Agreement of Third Person to Protect Surety.*—An agreement "to secure and protect (at any time payment must be made)" another in the settlement of a described promissory note, upon which the latter is surety, binds the promisor to take such measures as are necessary for the protection of the surety, whenever payment of the note, after its maturity, may be required, either by the payee or the surety. *Ib.*
8. *Judgment Defendants Primarily Liable.—Establishment of Suretyship.*—Parties against whom a judgment is taken are deemed primarily liable, unless the judgment determines the question of suretyship, though

after judgment one who occupies the relation of surety may have the fact judicially established, and an order for an execution in his favor.

Knopf v. Morel, 570

9. *Same.—Co-Sureties.—Jurisdiction.*—Jurisdiction to determine the rights of the plaintiff as against the defendants is not jurisdiction to determine the rights of the defendants on the question of suretyship, and does not of itself authorize an adjudication on that subject. *Ib.*
10. *Same.*—To secure a judicial determination of the question of suretyship, proper steps must be taken to invest the court with jurisdiction, and jurisdiction is not conferred by a complaint upon an instrument which does not on its face fully disclose the relation of the parties. *Ib.*
11. *Same.—Question of Suretyship an Independent One.—General Rule.—Exception.*—The question of suretyship, so far as it affects the rights of the debtors between themselves, is an independent one, and is not as a general rule determinable upon the complaint, although there are cases where the complaint so fully discloses the facts as to give jurisdiction to adjudicate upon questions of suretyship without process issuing upon the cross-complaint, and even without a cross-complaint. *Githens v. Kimmer*, 68 Ind. 362, limited. *Ib.*
12. *Same.—Endorser.—Establishment of Suretyship.*—An endorser can not have a judgment conclusively establishing suretyship upon the complaint of the plaintiff on a promissory note upon which, from the position of his name upon the instrument, he *prima facie* appears as surety, without bringing the makers into court upon the question of suretyship. *Ib.*
13. *Same.—Judgment Determining Suretyship Without Proper Pleadings Void.*—A judgment rendered in an action before a justice of the peace, where the only complaint is a promissory note bearing the names of two makers on the face thereof and the name of another on the back, which assumes to determine the question of suretyship by adjudging the party whose name is on the back of the note to be surety, there being no pleadings filed raising such question, is invalid so far as it assumes to settle the question of suretyship, and is no bar to a subsequent action for contribution against the party so adjudged to be surety. *Ib.*
14. *Same.—Endorser.—Liability of.—Presumption.—Evidence.*—An endorser is not presumed to be a co-surety of one who signs as maker of a note, but parol evidence is admissible to prove that he did sign as co-surety. *Ib.*
15. *Same.—Contribution.—Endorser.—Co-Sureties.—Pleading.—Complaint.*—In an action for contribution, by one claiming to be surety on a promissory note upon which judgment has been rendered against an endorser who it is alleged was the co-surety of the plaintiff, it is sufficient to allege in the complaint that they were co-sureties, and that neither received any part of the consideration, without an averment that there was any contract between the parties establishing the relation claimed. *Ib.*
16. *Same.—Co-Sureties.—Contract Between Endorser and Maker.—Evidence.—Admission by Conduct.*—In an action for contribution by one claiming to be surety, seeking to establish the relation of co-suretyship between himself and one claiming to be endorser merely, evidence tending to show that the latter had entered into an agreement with the maker, after the execution of the note, that such maker should pay him five dollars each week, and that under such agreement he had received fifteen dollars, is admissible, not for the purpose of charging the defendant with the money received, but as an admission by conduct. *Ib.*
17. *Same.*—The fact that an endorser of a promissory note received money

from the principal to apply on the note is not of itself sufficient to entitle one who signs as maker to contribution. The endorser is bound to apply the money so received to a reduction of the debt, but his position is not thereby changed to that of a co-surety. *Id.*

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See EXECUTION.

PROMISSORY NOTE.

See DECEDENTS' ESTATES, 1; FRAUD; JUDGMENT, 4, 5, 11, 15; PARTNERSHIP; PAYMENT; PRINCIPAL AND SURETY.

PROSECUTING ATTORNEY.

See CRIMINAL LAW, 22, 40 to 42.

QUIETING TITLE.

See ADVANCEMENT; CONVEYANCE; DEED; HUSBAND AND WIFE, 3; NEW TRIAL, 5; REAL ESTATE, 1; STATUTE OF LIMITATIONS.

1. *Guardian's Sale. — Ejectment. — Former Adjudication. — Pleading.*—To a complaint by the heirs of W. against the remote grantees of R. to quiet title to real estate, an answer setting up a judgment rendered in an action prosecuted in his lifetime by W. against R., then in possession and claiming title through a sale made upon petition of the guardian of W., for the recovery of the land, wherein it was decreed that W. was not the owner and was not entitled to the possession thereof, is good. *Walker v. Hill, 223*
2. *Complaint. — Necessary Allegations.*—A complaint to quiet title must show, either by direct averment or by the statement of facts from which the inference necessarily arises, that the defendant's claim is adverse, or unfounded, and a cloud upon the plaintiff's title. *Otis v. Gregory, 504*

QUO WARRANTO.

See OFFICE AND OFFICER, 5.

RAILROAD.

See COMMON CARRIER; CONTRACT, 1 to 4, 7; EVIDENCE, 1, 2, 4; MASTER AND SERVANT; NEGLIGENCE.

1. *Bridge Abutting on Highway. — Fence. — Stock.*—While a railroad company is not required to fence its track, or to maintain cattle-pits, at points where to do so would interfere with the safety of its employees in operating trains, or where fences or cattle-pits would interfere with its rights or with the rights of the public in travelling or doing business with the company, yet the burden is upon the company to show that, in constructing and maintaining a bridge abutting upon a highway, it had adopted all reasonable and practicable precautions to keep animals from entering upon the bridge from the highway; and it does not alter the case that the bridge may have been partially in the highway, or that the animal may have been struck while upon that part of the bridge extending into the highway, on ground appropriated by the company. *Cincinnati, etc., R. R. Co. v. Jones, 259*
2. *Same. — Securely Fenced.*—Where, in the absence of a showing that it is reasonably impracticable to do otherwise, a railroad company maintains a bridge in such a condition that animals may enter upon it from a public highway, thus putting in jeopardy the safety of trains as well as the lives of the animals, the railroad is not securely fenced. *Id.*

RAPE.

See CRIMINAL LAW, 7, 8, 43.

RATIFICATION.

See ATTORNEY AND CLIENT, 1, 2.

REAL ESTATE.

See ADVANCEMENT; CANAL; CONTRACT, 5; CONVEYANCE; DECEDENTS' ESTATES; DEED; FRAUD; GUARDIAN AND WARD; HUSBAND AND WIFE; JUDGMENT, 2, 9, 13; MARRIED WOMAN; MECHANIC'S LIEN; MORTGAGE; QUIETING TITLE; SHERIFF'S SALE; STATUTE OF LIMITATIONS; TAX SALE; TRUST AND TRUSTEE; WILL.

1. *Action to Recover.—Parent and Child.—Evidence.*—In an action by a father against a daughter and her husband to recover possession of land and to quiet title, the evidence showed, in substance, that the plaintiff was the owner in fee simple of the real estate; that he was an old man; that he had proposed to his daughter that if she would live with and take care of him during the remainder of his life, he would, at his death, give her all his property, and that she should have the use of all which he did not want to use; that the proposition was accepted, and the daughter and her family moved upon the land and into the plaintiff's house; that a deed from the plaintiff to his daughter had been prepared but never executed.

Held, that the evidence is not sufficient to sustain a judgment for the defendants. *Zenor v. Johnson*, 42

2. *Executory Contract to Convey.—Suit to Enforce.—Tender of Deed.—Complaint.*—Where the vendor seeks to enforce an executory contract for the conveyance of land, the complaint must aver a tender of a sufficient warranty deed, and the tender must be kept good by bringing the instrument into court, or by an averment of a readiness and willingness to execute a deed that will vest title in the purchaser.

Goodwine v. Morey, 68

REAL ESTATE, ACTION TO RECOVER.

See CONVEYANCE; QUIETING TITLE, 1; REAL ESTATE; STATUTE OF LIMITATIONS; TRUST AND TRUSTEE.

REDEMPTION.

See JUDGMENT, 13; SHERIFF'S SALE, 5 to 8.

RELEASE.

Construction of.—Extrinsic Evidence.—To enable a court to construe a release from the stand-point occupied by the parties, extrinsic evidence is admissible to explain the circumstances under which it was executed, and the nature of the transaction to which it was designed to apply. The particular purpose for which it was executed ought to be kept in view, and where only general words are used they are to be construed most strongly against the party executing the release. *Rowe v. Rand*, 206

REMEDIES.

See APPEAL, 6.

Misconception of Party.—A party who imagines he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy, because he first tries a wrong one, which is not inconsistent with the true and effectual remedy which he should have pursued in the first instance. *Bunch v. Grave*, 351

RENTS AND PROFITS.

See SHERIFF'S SALE, 5 to 8.

REPEAL OF STATUTE.

See CONSTITUTIONAL LAW; GRAVEL ROAD, 6; STATE UNIVERSITY; STATUTE, 2 to 5.

RESPONDEAT SUPERIOR.

See COUNTY, 1; GRAVEL ROAD, 10.

REVIEW OF JUDGMENT.

See APPEAL, 5, 6.

RULES OF COURT.

See SUPREME COURT, 9.

SALE.

See CORPORATION; DECEDENTS' ESTATES, 2, 3; GUARDIAN AND WARD; JUDGMENT, 9, 13; SHERIFF'S SALE; STATUTE OF LIMITATIONS; TAX SALE.

SCHOOL FUND MORTGAGE.

See MORTGAGE, 2.

SCHOOLS.

1. *Rules and Regulations.—Power of School Boards to Adopt.*—Under the statutes of this State, construed in connection with the incidental powers of corporations, the various school boards, and other educational authorities, have power to adopt appropriate rules and regulations for the government of the schools under their control.
Fertich v. Michener, 472
2. *Same.—Method of Adopting Rules.—Superintendent or Teacher May Make.*—It is not necessary that all rules for the discipline and government of schools shall be made a matter of record by the school board, or that every act, order or direction affecting their management shall be authorized or confirmed by a formal vote; but any reasonable rule adopted by a superintendent or a teacher, not inconsistent with some statute or some other rule prescribed by higher authority, is binding upon the pupils.
Ib.
3. *Same.—City Schools.—Authority of Superintendent.*—A rule requiring the superintendent of city schools to visit weekly all the schools under his charge, and to see that the best methods of instruction are adopted, confers upon him authority, if it were otherwise wanting, to order and promulgate such additional reasonable rules as the best interests of the schools may require.
Ib.
4. *Same.—Tardy Pupils.—Exclusion from School-Room During Opening Exercises.—Reasonableness of Rule.*—A rule requiring tardy pupils to remain either in the hall of the school building, which is provided with heat, or in the office of the principal, until the opening exercises, lasting from ten to fifteen minutes, are concluded, in order that such exercises may not be interrupted or disturbed, is in itself a reasonable regulation.
Ib.
5. *Same.—Enforcement of Rules.—Must be Reasonable Under the Circumstances.*—In the enforcement of all rules for the government of a school, due regard must be had to the health, comfort, age, mental and physical condition of the pupils, and to the circumstances attending each particular emergency, and the condition of the weather, the infirmity of a pupil, and the like, may require relaxation in their strict enforcement.
Ib.
6. *Same.—Unreasonable Enforcement of Reasonable Rule.*—A school regulation must not only be reasonable in itself, but its enforcement must also be reasonable under all the circumstances. The habit of locking the doors of a school-room during the opening exercises is not an unreasonable enforcement, under ordinary circumstances, of a rule requiring pupils to remain in the hall during that time; but if the

weather is unusually severe, and proper steps are not taken for the comfort of children thus excluded, such method of enforcement is unreasonable and improper. *Ib.*

7. *Same.—Liability of School Officer.—Error of Judgment.*—A school officer is not personally liable for a mere mistake of judgment in the government of his school; but to create liability it must be shown that he acted in the matter complained of wantonly, wilfully or maliciously. *Ib.*
8. *Same.—Detention of Pupil After School Hours.—False Imprisonment.*—The detention of a pupil for a short time after school hours, as a penalty for some omission or misconduct, is one of the recognized methods of enforcing discipline and promoting the progress of the pupils in the common schools, and although the detention be mistaken it possesses none of the elements of false imprisonment, unless imposed from wanton, wilful or malicious motives. *Ib.*
9. *Same.—Reasonableness of Rule a Question of Law.—Instruction.*—It is for the court to determine, as a matter of law, whether or not a rule is a reasonable one, and an instruction which confounds the reasonableness of the rule with its unreasonable enforcement, and submits the matter of reasonableness to the jury as a hypothetical question, dependent upon the existence or non-existence of certain enumerated facts, thus making the question of validity one of mixed law and fact to be determined by the jury, is erroneous. *Ib.*

SECRETARY OF STATE.

See OFFICE AND OFFICER, 1, 2.

SET-OFF.

See EVIDENCE, 9; PARTNERSHIP, 2.

SHERIFF'S SALE.

See MARRIED WOMAN, 7.

1. *Void Judgment.*—Where a judgment is void all proceedings thereunder, including a sale, are also void. *Ferrier v. Deutchman, 320*
2. *Same.—Sale Made Under Several Judgments, Some Valid and Some Void.*—A sale made under several judgments, some of which are void and the others valid and regular, is nevertheless void. *Ib.*
3. *Purchaser.—Prior Encumbrance.—Effect of Payment by Purchaser.*—Where the equity of redemption in real estate is sold on execution, the purchaser takes the land charged with all prior encumbrances. The amount bid will be presumed to be the price or value of the property, less the encumbrances, and where the purchaser obtains title to the land, and subsequently pays off pre-existing liens of which he had notice, he will not be permitted to keep them alive by having them assigned to himself, when to do so would operate as an injury to another who has the right to have them treated as extinguished. *Bunch v. Grave, 351*
4. *Same.—Married Woman.—Mortgage.*—G. purchased at sheriff's sale on execution a tract of land sold as the property of B., subject to the lien of two prior mortgages executed by B. and wife. Afterwards the wife of B. had her one-third interest in the land set off to her under the provisions of the act of March 11, 1875. Subsequently, G.'s title having matured, he purchased and had assigned to him one of the prior mortgages, which he caused to be foreclosed, taking the decree in his own name. The other was foreclosed, and the decree and judgment purchased by and assigned to G. Both decrees adjudged that G.'s interest in the land should be first sold for the pay-

ment of the debts. His interest exceeded in value the amount of the judgments.

Held, that by the purchase of the mortgage debts by G., they were thereby extinguished as to Mrs. B., and no longer operated as liens upon her interest in the land. *Ib.*

5. *Redemption of Real Estate.—Act of 1861.—Rents and Profits.—Judgment Debtor Alone Liable for.*—Under the redemption law of 1861, no one except the judgment debtor could be held liable to the execution purchaser for the rents and profits of the real estate during the year allowed for redemption. *Adams v. Glidden, 528*

6. *Same.—Act of 1879.—Occupant of Land Liable for Rents and Profits.*—The redemption law of 1879, which superseded that of 1861, made the occupant, although not the judgment debtor, liable for the rents and profits of real estate during the year for redemption. *Ib.*

7. *Same.—Redemption Law of 1881.—No Liability for Rents and Profits by Virtue of Act.*—Under the act of 1881 on the subject of redemption, no one is liable to the execution purchaser, by virtue of the act alone, for the rents and profits of real estate during the period allowed for redemption. *Ib.*

8. *Same.—Vendor's Lien.—Redemption Laws Construed.*—A vendor's lien attached to real estate in 1876. After the taking effect of the redemption law of 1881, the lien was enforced, and the real estate sold by the sheriff under the decree of foreclosure. At the time of the foreclosure and sale, and during the year following the sale, the real estate was occupied by a grantee of the judgment debtor.

Held, that such occupant is not liable to the execution purchaser for the rents and profits of the land during the year following the sale, either under the provisions of the redemption law of 1861 or that of 1881. *Ib.*

SHORT-HAND REPORTER.

See BILL OF EXCEPTIONS, 3.

SOLDIER'S BOUNTY.

1. *Military Service.—Liability of County.—Contract.—Mutuality.—Statute of Limitations.*—Where, during the late war, a county appropriated money to induce, by the payment of bounties, the enlistment of men in the military service of the United States to fill its quota under a call for additional troops, an agreement in writing on the part of men already in the service, procured by one not shown to have been an agent of the county, to accept the offered bounty and be credited to such county, is not responsive to the proposition contained in the order of the county commissioners, but is more in the nature of a counter-proposition, requiring a further order of the board to make it binding as a contract, and in the absence of such further order the contract can not be deemed one wholly in writing, and the six years statute of limitations is a good defence to an action thereon.

Board, etc., v. Crockett, 316

2. *Same.—Consideration.*—If a soldier was credited to a certain county at the time he was mustered in, or if such county then became entitled to have him so credited, any subsequent promise made to him for the purpose of obtaining his consent to be credited to that county, was without consideration. *Ib.*

SPECIAL FINDING.

1. *Exception to.—Practice.—Motion for New Trial.*—A simple exception to a finding of facts does not raise a question as to whether the finding is in accordance with or contrary to the evidence, but a motion for a new trial is necessary. *Gardner v. Case, 494*

2. *Same.—Exception to Conclusions of Law.—Admission.*—An exception to conclusions of law admits, for the purposes of the exception, that the facts have been fully and correctly found. *Ib.*

STATE BOARD OF HEALTH.

See OFFICE AND OFFICER, 1, 2.

STATE UNIVERSITY.

1. *Character of Corporation.—Endowment Fund.—Interest.*—The State University is not a public corporation, but a private, or at most a *quasi* public one, and its endowment fund is not embraced by the phrase "public funds" as used in section 5205, R. S. 1881, fixing the rate of interest upon the latter class of funds at eight per cent.
State, ex rel., v. Carr, 335
2. *Same.—Repeal of Statute.—Interest on Public Funds.—Auditor of State.*—Section 4600, R. S. 1881, requiring the auditor of state to loan the university fund, for which provision is made by section 4595, at seven per cent. interest, was not repealed by the later enactment, section 5205, fixing the rate of interest on public funds at eight per cent. and repealing "all acts on the subject of interest, including such as relate to interest on public funds."
Ib.

STATUTE.

See CONSTITUTIONAL LAW; PLEADING, 7.

1. *Construction.—Forms.*—A form prescribed by statute is an essential and controlling part of the statute. *Orr v. Meek, 40*
2. *Repeal by Implication. — Gravel Road Acts.—Separate Systems of Procedure.*—The gravel road law of March 3, 1877, was not repealed by the act of April 8, 1885, on the same subject; but an intention being manifested to not repeal the former act, two systems for the construction of gravel roads and the making and collection of assessments are created. *Deisner v. Simpson, 72 Ind. 435, distinguished. Robinson v. Rippey, 114*
3. *Same.—Similarity of Provisions of Two Statutes.—Inconvenience.*—If an intention to construct two systems for the government of the same subject is manifested, the similarity in the provisions of the two statutes, and the inconvenience worked thereby, are not sufficient to constitute a repeal of the earlier one by implication. *Ib.*
4. *Same.—Later Act Covering Same Subject-Matter.—When Former Act not Repealed.*—The rule that where a later act covers the whole subject-matter of a former one, and contains irreconcilable provisions, a repeal will be implied, fails where an intention not to repeal is manifested and where both acts may stand. *Ib.*
5. *Same.—Incompleteness of Act.—Construction.*—It is not a sufficient objection to an act that it is not in itself complete in every part, for in interpreting and enforcing a statute it is not to be considered alone, but as part of a system of law. *Ib.*
6. *Construction.—Custom.*—A practical construction given to a statute by custom is equivalent to a positive law. *Board, etc., v. Bunting, 145*

STATUTE CONSTRUED.

See APPEAL, 8 to 10; ATTORNEY AND CLIENT, 3; CRIMINAL LAW, 3; INSURANCE, 7, 10; INTOXICATING LIQUOR; SHERIFF'S SALE, 5 to 8; STATE UNIVERSITY; TAX SALE.

STATUTE OF FRAUDS.

See CONTRACT, 5.

STATUTE OF LIMITATIONS.

See GUARDIAN AND WARD; SOLDIER'S BOUNTY; TRUST AND TRUSTEE.

1. *Guardian's Sale of Real Estate.—Adverse Possession.—Ejectment.—Quiet-ing Title.*—Where the purchaser at a guardian's sale, made in 1852, went into immediate possession of the land, causes of action for the recovery thereof and to quiet title thereto accrued at that time, and, even if the sale was void, adverse possession having been continuously held by the purchaser and his grantees, such causes of action are barred. Sections 293 and 294, R. S. 1881. *Walker v. Hill, 223*
2. *Same.—Disabilities.—Infancy.*—Where one is under the disability of infancy at the time a cause of action in his favor accrues, the statute of limitations, nevertheless, begins to run, and, under section 296, R. S. 1881, the only effect of such disability is to give the party, if the full limitation has run during his infancy, two years after reaching legal age within which he may sue. *Ib.*
3. *Same.—Infancy and Coverture.*—Where the statute of limitations begins to run during infancy, it is not impeded by the subsequent intervention of the disability of coverture, as one disability can not be tacked to another to stay the operation of the statute. *Ib.*
4. *Guardian's Sale.—Legal Disability.*—Under section 293, R. S. 1881, an action for the recovery of real estate sold by a guardian or commissioner of a court must be commenced within five years after the sale is confirmed; but if the party entitled to maintain the action is under a legal disability, then, under section 296, if the full period of limitation has expired during the existence of the disability, the action must be brought within two years after its removal.

Davidson v. Bates, 391

STOCK AND STOCKHOLDERS.

See CORPORATION; TAXES.

STREET RAILWAY.

See NEGLIGENCE, 4 to 7.

SUBROGATION.

See MORTGAGE, 7; PRINCIPAL AND AGENT, 1.

SUMMONS.

See CRIMINAL LAW, 10; NOTICE.

SUPREME COURT.

See APPEAL; ATTACHMENT, 1; BILL OF EXCEPTIONS; CONTINUANCE;
CRIMINAL LAW, 12, 13, 16, 18, 31; PRACTICE.

1. *Instructions to Jury.—Evidence Not in Record.*—Where the evidence is not in the record, the Supreme Court can not say that instructions given or refused were erroneous. *Low v. Deiner, 46*
2. *Practice.—Appeal.—Showing of Error.—Reversal of Judgment.*—Unless the record affirmatively shows the existence of error, and that it was, or probably was, prejudicial to the party complaining, the judgment will not be reversed. *Harter v. Eltzroth, 159*
3. *Brief.—Mere Restating of Causes for New Trial.*—The mere restating in a brief of the causes assigned for a new trial does not meet the requirements of the rule of the Supreme Court relating to briefs. *Louisville, etc., R. W. Co. v. Donnegan, 179*
4. *Same.—References to Record.*—Parties asking for a reversal of a judgment must furnish references to such portions of the record as will show that error intervened in the proceedings below. *Ib.*
5. *Joint Assignment of Error.—Sufficiency of.*—A joint assignment of errors

by two or more appellants will not present any question for decision unless it is good as to all who have united therein.

Walker v. Hill, 223

6. *Law of Case.—Decision of Supreme Court.*—The decision of the Supreme Court in a cause remains the law of the case in all subsequent proceedings. *Continental Life Ins. Co. v. Houser, 266*
7. *Assignment of Error.—Joint Assignment.—Effect of.—Complaint Good as to One Appellant.*—Where a complaint is good as to one appellant, a joint assignment of errors will not prevail against it. *Rogers v. Union Cent. L. Ins. Co., 343*
8. *Instructions to Jury.—Applicability to Evidence.—Practice.*—Where the evidence is not properly in the record, no available question can be predicated upon the giving or the refusal to give instructions, the correctness of which depends upon the facts. *Lyon v. Davis, 384*
9. *Certiorari.—Rules of Trial Court.*—The Supreme Court will not take notice of the existence of the rules of a trial court unless they are properly in the record on appeal, and will not require the clerk, by writ of certiorari, to certify such rules, unless embraced in a bill of exceptions or ordered by the court to be so certified. *Rout v. Ninde, 597*

SURETY.

See APPEAL, 11; ATTACHMENT, 2 to 5; CONVEYANCE, 3; GUARANTY; HUSBAND AND WIFE; JUDGMENT, 15; MARRIED WOMAN; MORTGAGE, 4, 8; OFFICE AND OFFICER, 4; PRINCIPAL AND SURETY.

SURFACE WATER.

See NUISANCE.

TAXES.

See TAX SALE.

1. *Assessment of National Bank Stock.—Right of Owner to Deduct Indebtedness.*—The owner of national bank stock is entitled to deduct from its value, if he have no other credits from which the deduction can be made, the amount of the *bona fide* debts owing by him. *City of Indianapolis v. Vajen, 240*
2. *Same.—Refusal to Allow Deduction.—Erroneous Assessment.—City.—Refunding Taxes Erroneously Collected.*—Where a taxpayer, in making his assessment list for city taxation, gives notice of his indebtedness, but does not enter it upon his list, and demands of the assessor the right to deduct from the value of his national bank stock the amount of his *bona fide* indebtedness, which that officer refuses to allow on the ground that such deduction is not authorized by law, and afterwards makes a like demand of the city treasurer before paying his taxes, which is also refused, the assessment, to the extent of the deduction improperly denied, is erroneous, and the taxpayer is entitled to have the excess of taxes collected refunded, whether paid voluntarily or not, and without appearing before the board of equalization and there attempting to have the assessment corrected. *Ib.*

TAX SALE.

1. *Deed.—Permanent Improvements.—Adverse Title.*—A purchaser of land at a tax sale, who has received a tax deed and taken possession and made permanent improvements, but whose deed is not effectual to convey title, can only recover for such improvements as were made after receiving his deed and before notice of an adverse claim to the land. *Hilgenberg v. Rhodes, 167*
2. *Same.—Statute Construed.—When Recovery Had for Improvements.*—Section 253, of the tax law of 1872, providing that the purchaser "shall

be entitled to receive what such improvements are reasonably worth, to be assessed on the trial of said cause," does not fix the cases in which there may be a recovery, but only secures to the purchaser the value of improvements in a case where he is entitled to recover. *Ib.*

3. *When not Void.—Lien of State.—Complaint to Set Sale Aside.—Injunction.*—Where a taxpayer has sufficient personal property to pay his taxes at the time his land is sold for that purpose, the sale is ineffectual to convey title, but it will transfer to the purchaser the lien of the State, and is, therefore, not absolutely void; and a complaint to set aside the sale and to enjoin the auditor from issuing a deed on that ground will not lie. *St. Clair v. McClure, 467*

TENANCY.

See HUSBAND AND WIFE; LEASE; MORTGAGE, 8.

TENDER.

See REAL ESTATE, 2.

TIME.

See APPEAL, 8 to 10.

TITLE.

See ADVANCEMENT; CANAL; QUIETING TITLE; REAL ESTATE; TAX SALE.

TORT.

See MALICIOUS PROSECUTION; NEGLIGENCE.

Pleading.—Complaint.—Conspiracy.—Where two or more are sued in tort for an injury to another, an allegation of conspiracy is not necessary, unless the wrong complained of would not have been actionable at all but for the unlawful combination of several persons.

Jenner v. Carson, 522

TOWN.

1. *Municipal Corporation.—Special Charter.—Amendment.—Enlargement of Jurisdiction.*—Where, prior to November 1, 1851, a municipal corporation was created and organized under a special act, and such act was continued in force by the Constitution of 1851, the General Assembly has power, by special act, to amend the act of incorporation, so as to enlarge the jurisdiction of the municipality territorially or otherwise. *Wiley v. Corporation of Bluffton, 152*
2. *Same.—Town of Bluffton.—Amendment of Charter by Special Act.—Constitutional Law.*—The subject of the act of February 15, 1873, to amend certain enumerated sections of the act of February 12, 1851, to incorporate the town of Bluffton, is not one of the subjects enumerated in section 22, of article 4, of the Constitution of 1851, prohibiting the General Assembly from passing special laws, and is a valid and constitutional exercise of legislative power. *Ib.*
6. *Same.—Local and General Laws.—Question for Legislature.*—It is for the Legislature alone to judge whether a law on any given subject, not enumerated in section 22, of article 4, of the Constitution, can be made applicable and of uniform operation throughout the State, as required by section 23 of the same article. *Ib.*

TOWNSHIP.

See COUNTY.

TRIAL.

See CONTINUANCE; MORTGAGE, 1.

TRUST AND TRUSTEE.

See CONVEYANCE; COUNTY, 3; PRINCIPAL AND AGENT, 6.

Real Estate.—Disavowal of Trust.—Notice.—Acquiescence.—Action to Recover.—Adverse Possession.—Statute of Limitations.—Where a trustee disavows the trust, asserts title in himself, and holds adverse possession for more than twenty years, and the beneficiary, with notice, acquiesces therein, an action to recover the land is barred. *Ward v. Harvey*, 471

TURNPIKE.

See GRAVEL ROAD.

VENDOR AND PURCHASER.

See HUSBAND AND WIFE, 2, 3; MORTGAGE, 6, 7; REAL ESTATE.

VENDOR'S LIEN.

See MORTGAGE, 6, 7; SHERIFF'S SALE, 8.

VOLUNTARY ASSIGNMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

WABASH AND ERIE CANAL.

See CANAL; LEASE.

WAIVER.

See APPEAL, 4, 6; INSURANCE, 1; INTOXICATING LIQUOR, 3; PRACTICE, 2.

WAREHOUSEMAN.

See COMMON CARRIER, 3.

WARRANTY.

See CORPORATION.

WAYS.

See CANAL; GRAVEL ROAD; HIGHWAY.

WIDOW.

See DECEDENTS' ESTATES, 3; WILL, 1, 3.

WILL.

See DECEDENTS' ESTATES, 3; LIFE INSURANCE, 3.

1. *Bequest to Wife.—Action.—Party in Interest.—Conversion.—Executor.*—Where, by the express terms of a will, the testator gave and bequeathed all his personal property, absolutely and without limitation or restriction, to his wife, an action can not be maintained by an heir, during the lifetime of the wife, upon the bond of the executor, for the unlawful conversion by such executor of any part of the personal estate, the wife being the only party interested, and she alone having a right to complain of such conversion. *State, ex rel., v. Ruhlman*, 17
2. *Character of Estate Taken.—Remainders.*—A remainder will never be held to be contingent where it can be held to be vested consistently and in harmony with the apparent intention of the testator. *Davidson v. Bates*, 391
3. *Same. — Construction.—Vested Remainder.*—Under a will executed and probated in 1844, directing that the use and occupation and the rents and profits of certain real estate should be allowed or paid over to his wife during her natural life, for the maintenance and support of herself and a minor son, and that after the death of the wife, and after the son should become of age, such real estate should be divided equally among the testator's children, the children take a vested remainder, subject to the mother's life-estate. *Id.*

WITNESS.

See CRIMINAL LAW, 43; EVIDENCE; INSURANCE, 6; PARTIES; PRACTICE, 1.

1. *Recalling.—Discretion of Trial Court.—Practice.*—The recalling of a witness, after he has been examined and discharged, rests in the sound discretion of the trial court. Neither party can recall him for further examination as a matter of right. The proper practice is to first obtain leave of the court. *Nixon v. Beard, 137*
2. *Order Separating Witnesses.—Disobedience of Order.*—Where there is an order separating the witnesses, a party can not be deprived of the testimony of a witness who has been present throughout the trial, where it was not known at the time of the order, either by the witness or the party calling him, that his testimony would be required, or where the presence of such witness was not by the procurement or connivance of such party, nor attributable to any fault on his part or that of his counsel. *State, ex rel., v. Thomas, 515*

WORDS AND PHRASES.

See APPEAL, 3; BILL OF EXCEPTIONS, 1; CRIMINAL LAW, 3, 17.

END OF VOLUME 111.

Ex. E. A. A.

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